ASIA LECTURE SERIES

Lectures on Law of Property

(Transfer of Property, Easements and Wills)

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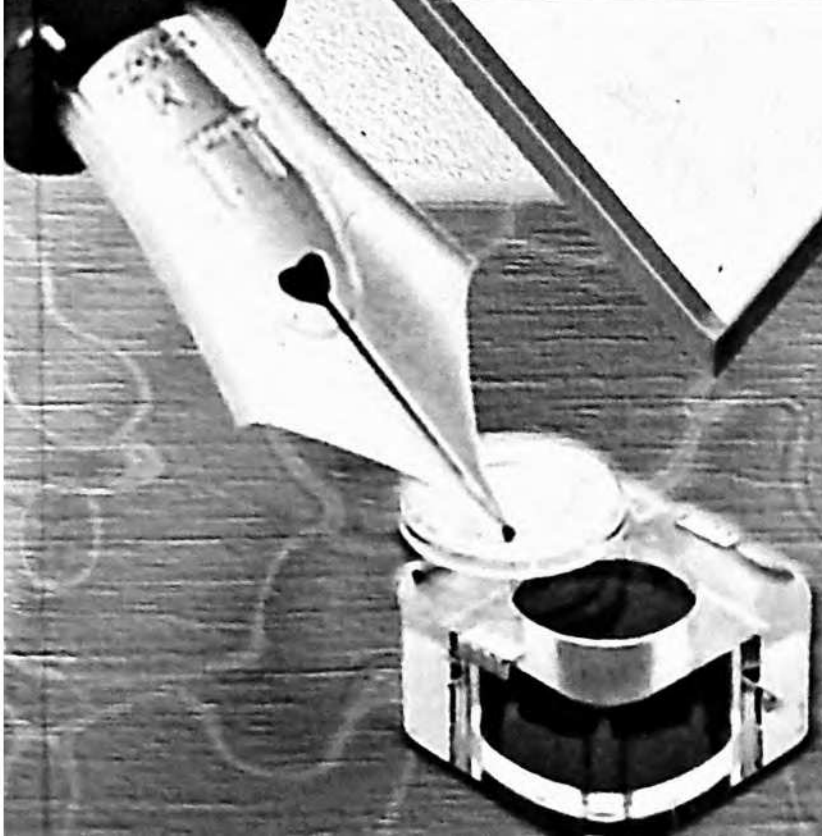

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Hyderabad

LECTURES ON TRANSFER OF PROPERTY ACT

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LECTURES ON TRANSFER OF PROPERTY ACT

The Transfer of Property Act is one of the most important branches of the Law of property. It was passed in the year 1882. It contains 137 sections and is divided into eight chapters.

The Transfer of Property Act comprises of two parts namely:

1. General Principles; and
2. Specific Transfers.

Therefore, this book comprises of two parts as follows:

The Transfer of Property Act, 1882

Part I : General Principles (Sections 1 to 53.A); and

Part II : Specific Transfers (Sections 54 to 137).

Part – I

General Principles

[Sections 1 to 53A]

LECTURE I

INTRODUCTION

This lecture covers –

- Introduction
- Meaning and Object
- Historical Background
- Territorial Extent
- Scope of the Act
- Changes brought about the Act of 1929 and
- Scheme of the T.P. Act, 1882

In a civilised society, transfer of property from one person to another is quite obvious. There are different laws/legislations governing the transfer of property, movable and immovable under different circumstances as stated below:

1. When a movable property (or goods) is transferred from one living person to another living person, the law applied is the Sale of Goods Act, 1930.

2. When property is transferred from dead person to living person/persons, the law applied is the Law Succession

(i) When a person dies testate i.e. dies leaving a testate/Will, the law applied is, Testamentary Succession.

(ii) When a person dies intestate i.e. dies without testate/Will, the law applied is, Intestate Succession.

3. When an immovable property is transferred from one living person to another living person, the law applied is, Transfer of Property Act, 1882.

The Transfer of Property Act was passed in 1882 and came into force from 1st July 1882. It mainly deals with the transfer of immovable property and also movable property between two living persons i.e. transfer inter vivos. The Act does not apply to transfers by operation of law (E.g.: Succession, Court Sales, Insolvency etc.). It contains 137 sections divided into 8 chapters. Chapter-I containing Sections 1 to 4 deals with preliminary aspects. Chapter-II containing Sections 5 to 53.A lays down the provisions relating to general principles. Chapters-III to VIII (enlisted under Part-II) containing Sections 54 to 137 deal with specific transfers viz. Sale, Mortgage, Lease, Exchange, Gift etc. It is significant to note that, the Act nowhere defined 'what is transfer of property?' It merely defines the word 'transfer' under Section 5.

Transfer of Property: Transfer of Property may be explained under the following categories:

1. Transfer of movable and immovable property.

2. Transfer *inter vivos* i.e. between two living persons and transfer from one dead person to one or more living persons; and

3. Voluntary transfers and involuntary transfers.

The Transfer of Property Act mainly deals with the transfer of immovable property. As stated above, some of the Sections also deal with movable property. Sections 5 to 37 of Chapter-II are applicable, where the property is immovable or movable. Chapters III to V containing Sections 54 to 117 deal with immovable properties only. Chapters-VI to VIII containing Sections 118 to 137 are applicable to both immovable and movable properties. With regard to the second category, the Act deals with first part i.e. transfer inter vivos, while the transfers from dead person to living person/persons are governed by the Indian Succession Act (Law of Inheritance). With regard to the third category, the Act deals with voluntary transfers, while the Insolvency Act and Civil Procedure Code deal with the involuntary transfers.

Meaning and Object: The main object as enshrined in the preamble of the Transfer of Property Act was to amend/regulate the law relating to the transfer of property by the act of parties. The main purpose of the Act is to bring the rules, which regulated the transmission of property between living persons into harmony with the rules affecting its devolution and thus to furnish as it were a complement to the work accomplished in framing the law of testamentary and intestate succession. Its second purpose was to complete the Code of the law of contract in so far as it related to immovable property. It is not exhaustive and leaves the scope for applying the rules/principles of justice, equity and good conscience in case a particular case is not covered by any one of the provisions of the Act. (Some of the principles of the Act are based on the principles of equity).

Historical Background: Before passing of the Transfer of Property Act, the Indian Courts, to settle the disputes, used to apply/follow the English law in the presidency towns of Madras,

Bombay and Calcutta and applied the principles of justice, equity and good conscience. Consequent to the dual system of law, there was no uniformity in application of the law resulting in uncertainty. To overshadow the situation, it was felt necessary to codify the law on Transfer of Property. For this purpose, a commission was appointed to prepare a Code of substantive law of transfer of property in India. The Commission prepared the draft of the T.P.Act in 1870 and submitted the same to the Duke of Argy, the then Secretary of State for the approval. The Bill with necessary modifications was presented in the Council in 1877. A select committee was appointed to examine the draft Bill, but it failed to give the draft, a concrete shape. Then, it was referred to the Second Law Commission. After many discussions and modifications, the Bill was revised and republished in 1878. The Bill so prepared was approved by the legislature and received the assent of the Governor General on 17 November 1882.

Territorial Extent: The Act of 1882 came into force on the 1st day of July, 1882, and it extended to the whole of British India except the territories administered by the Governor of Bombay in Council, the Lieutenant/Governor of the Punjab and the Chief Commissioner of Burma (now Myanmar). Subsequently, the Act was extended to the whole of the territories (other than the Scheduled districts) under the Administration of the Government of Bombay from 1st January 1893. Similarly, it was extended to the whole of Burma (now Myanmar) from 22nd December 1924.

The Extra Provincial Jurisdiction Act, 1947 empowered the Provincial Governments to apply the laws to certain territories belonging to Indian States which were merged in the Provincial Governments. Those areas are now merged in the territory of India and by virtue of the Merged States Laws Act, 1950 and the Part B States Laws Act, 1951, the Transfer of Property Act has been extended to the States which have now been merged in the territory of India.

Punjab: In Punjab, the Transfer of Property Act is not enforced but its provisions as to matters of principles are followed as rules of equity, justice and good conscience. This is to say the Courts in Punjab may follow those provisions of the Act which appear to be the statutory recognition of the principles of equity, justice and good conscience, but in so doing, the Courts would not rely upon the technicalities involved in any provision of the Act. From 6th May 1935, however, Ss.54, 107 and 123 have been extended to all the municipalities in Punjab including areas in Haryana and Chandigarh and the areas declared to be notified areas under Section 241 of the Punjab Municipal Act, 1911.

Delhi: In the Union Territories of Delhi, all the provisions of the Act except Section 129, have been made applicable with effect from 1st December 1962.

Bombay: The Act has been extended to the States merged in the State of Bombay by Act IV of 1950.

Madras: The Act has been repealed or modified to the extent necessary to give effect to the provisions of Madras Act III of 1922 in the city of Madras.

Kerala: The Act has been made applicable to Kerala by the Travancore-Cochin Act XI of 1955. Provisions of the Transfer of Property Act were made applicable in respect of agricultural lands in Travancore area of Kerala State with effect from 1st July 1955. Before that date, the provisions of the Act were applied as principles of justice, equity and good conscience.

In other parts of India the Act extended as follows:

(i) The State of Tripura and Vindhya Pradesh by Act XXX of 1950.

(ii) Manipur by Act XXX of 1950.

(iii) Madhya Pradesh by M.P.Act XII of 1950.

(iv) Shillong by Assam Act of 1947.

(v) The whole of the then Saurashtra and Hyderabad areas by Bombay Act 57 of 1959.

(vi) The whole of Rajasthan by Notification of the State Government in 1952.

(vii) Partially extended to Berar by Act 48 of 1941.

Scope of the Act: The scope of the T.P.Act is limited, as it does not apply to all transfers, which take place in India. The Act is subject to certain territorial and other limitations as stated below:

(1) The Transfer of Property Act applies to transfer by act of parties. It does not regulate a transfer by operation of law, i.e. a transfer which is necessiated by the order of a court of law, for example insolvency, court sale or auction, forfeiture, etc. Its operation is, therefore, limited to transfers by act of parties only except in a few cases saved by Section 2 of the Act.

(2) The Act deals with a transfer of property inter-vivos, i.e. a transfer between the living persons. Thus, a transmission of property which takes place under a will or through succession is not covered by this enactment. (Kishori vs. Krishna Kamini, 37 Cal. 377).

(3) Although the Transfer of Property Act, 1882, contains provisions also for the transfers of movable properties (e.g. Section 5 to Section 37) a major portion of the enactment is applicable to the transfers of immovable properties only.

(4) Section 2 of this Act saves the rules of Mohammedan Law in so far as they are inconsistent with any of the provisions contained in Chapter-II. The result is, therefore, that Chapter-II of the Transfer of Property Act does not affect the transfer by Mohammedans even if it is against any of the provisions of Chapter-II. Again, Section 129 of the Act expressly says that nothing contained in

Chapter-VII of the enactment (relating to gifts) shall be deemed to affect any rule of Mohammedan Law.

(5) Territorial limitations.

Thus, we see that the Act is not exhaustive. Although the Act covers a large area of the law of transfer of immovable property, it does not profess to be a complete Code. It was intended to define and amend the existing law, and not to introduce any new principles. (Tajjo Bibi vs. Bhagwan Prasad (1918) ILR 16 All. 295). When, therefore, the provisions of the Act are not applicable to a case, the Courts are entitled to apply rules of English Law, not inconsistent with the Act on the basis of the rules of justice, equity and good conscience.

The Transfer of Property Act, 1882 has been amended, repealed in part (partly) from time to time namely. The Amendment of 1929 or The Transfer of Property (Amendment) Act 1929 (Act No.XX of 1929) which came into force on 1st April 1930. The Amendment Act of 1929 amended more than 50 sections and introduced some new sections.

Changes brought about by the Act of 1929:

The Transfer of Property (Amendment) Act, 1929, which came into force from 1st April 1930 introduced drastic changes/extensive amendments in the Act. Some of the changes are detailed below:

(1) Registration of a compulsorily registrable document operates as constructive notice. The effect of this provision is to supersede the Privy Council decision in *Tilak Dhari Lal's case* (48 Cal 1 (PC).

(2) Transfer in favour of a class is not to be wholly void though some members of the class are unable to take. By this rule in *Leak vs. Robinson* (35 ER 979), it has been jettisoned and the decision of the Privy Council in *Sundarajan vs. Natarajan* (48 Mad 906 (PC) superseded.

(3) The doctrine of part performance has been statutorily recognised and embodied in Section 53-A. The result of this is to render obsolete such rulings of the Privy Council as Arif vs. adunath (58 Cal 1235 (PC) and *Pir Bux vs. Mohammed Tahir* (58 Bom 650 (PC).

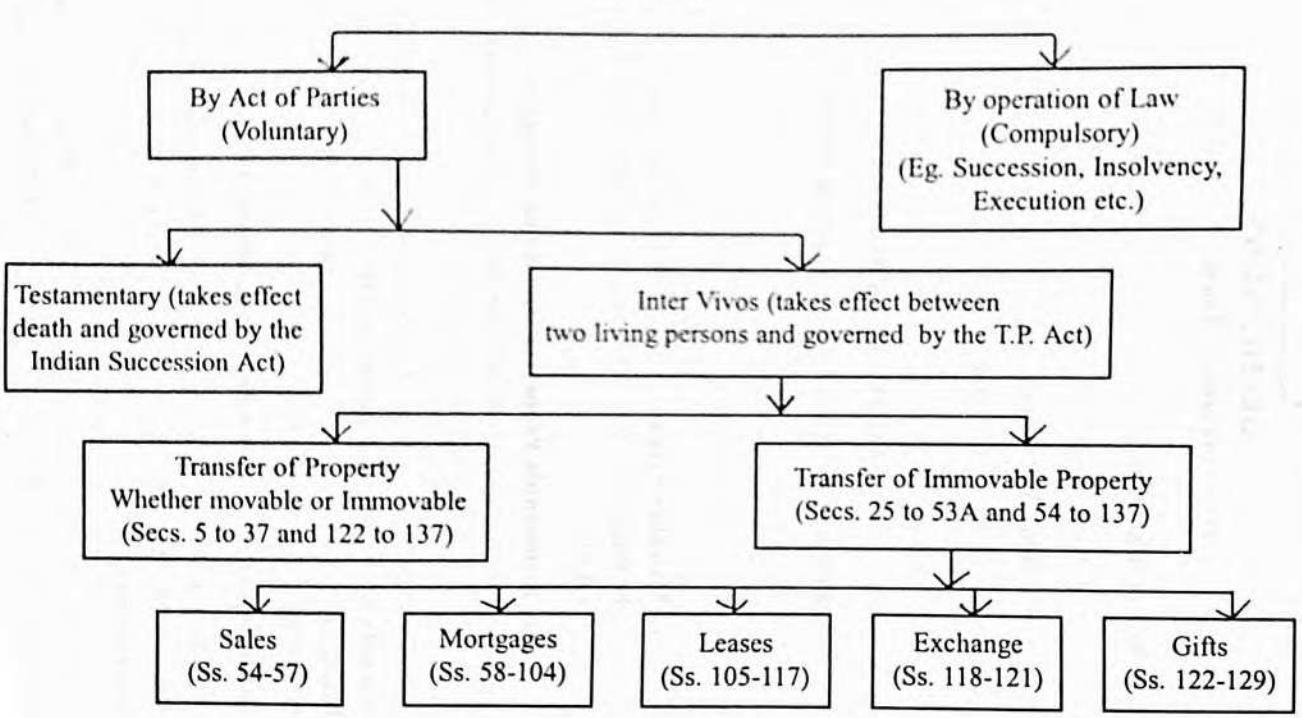
(4) A mortgage is usufructuary if the mortgagor binds himself to deliver possession though possession is not actually delivered. Thus provision statutorily overrules the view to the contrary taken by a Full Bench of the Madras High Court in *Subbamma vs. Narayya* (41 Mad 259 (FB).

(5) The mortgagee has to bring a single suit in consolidation of all the mortgages held by him in respect of which the mortgage money has become due and in respect of which he has the right to obtain the same kind of decree. This provision supersedes such decisions as *Subramania vs. Siva Subramania* (38 Mad 927 (FB) and *Sunder Singh vs. Valu* (20 All 322).

(6) The remedy of foreclosure which, according to the decision of the Privy Council in *Vasudeva Mudaliar vs. Srinivasa* (30 Mad 426 (PC), was available to the English mortgagee, has been taken away from him. This remedy is restricted to a mortgagee by conditional sale and a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclosure.

(7) The doctrine of subrogation has been crystallised in Section 92. The important change introduced by the amendment is that a conventional subrogation can be recognised only if it is evidenced by a registered instrument.

SCHEME OF THE TRANSFER OF PROPERTY ACT, 1882


Transfer
By Act of Parties (Voluntary)
By operation of Law (Compulsory) (Eg. Succession, Insolvency, Execution etc.)
Testamentary (takes effect death and governed by the Indian Succession Act)
Inter Vivos (takes effect between two living persons and governed by the T.P. Act)
Transfer of Property Whether movable or Immovable (Secs. 5 to 37 and 122 to 137)
Transfer of Immovable Property (Secs. 25 to 53A and 54 to 137)
Sales (Ss. 54-57)
Mortgages (Ss. 58-104)
Leases (Ss. 105-117)
Exchange (Ss. 118-121)
Gifts (Ss. 122-129)

LECTURE II

DEFINITIONS

(Interpretation Clause : Section 3)

This lecture deals with:

1. Immovable property.
2. Attested (Attestation).
3. Actionable Claim; and
4. Notice.

1. IMMOVABLE PROPERTY

Property may be divided into two classes, namely:

(i) Movable Property; and

(ii) Immovable Property.

(i) Movable Property: Movable property is one, which can be transferred from one place to another place with human efforts.

(ii) Immovable Property: Immovable property is one, which cannot be transferred from one place to another without causing damage to such property.

Transfer of Property Act deals with the transfer of both movable and immovable property. Most of the provisions relate to Immovable Property. Therefore, it is necessary to discuss in detail what is immovable property.

Definition of Immovable Property (Section 3):

Section 3, Para 2 of the Act defines Immovable Property, as 'Immovable Property' does not include standing timber, growing crops or grass.

The expression 'standing timber' means trees fit for use for building or repairing houses. Growing crops include all vegetable

growths, which have no existence apart from their produce such as pan leaves, sugarcane etc. Similarly, grass can only be used as fodder and is a movable property.

The above definition as negatively defined under the T.P.Act, excluding the above three items is not comprehensive. It merely excludes standing timber, growing crops and grass. It only says that three things, namely, standing timber, growing crops and grass are not immovable.

General Clauses Act 1897: Section 3k(26) of the General Clauses Act, 1897 defines 'Immovable Property' as follows:

"Immovable Property shall include land, benefits arising out of land and things attached to the earth, or permanently fastened to anything attached to the earth." This definition has reference only to physical objects and does not furnish an exhaustive test of what is, and what is not, immovable property. The term immovable property includes three things namely–

(i) Land.

(ii) Benefits arising out of land; and

(iii) Things attached to earth.

(i) Land: This word does not include only the upper surface of the earth but is extensive enough to cover things below it, for example, minerals. All these are immovable property. Any right in these or in respect of these or any other interest in it are all immovable property. Besides well, tube-well, rivers, ponds, tanks, stream, canal, dug on surface whether natural or artificial and all interests in these would fall within the meaning of the term 'land'.

(ii) Benefits arising out of land: Benefits arising out of land like the right to receive future rent is an Immovable Property. The examples of benefits are rent from house, shops and Jagir, Revenue from agriculture, right to collect lac, leaves or other things from forest trees, etc. Similarly right to collect Tahbazari from rural market, Baithaki right to collect tax on ghats and bridges are all examples of benefits arising out of land.

(iii) Things attached to earth: Following items fall within the meaning of the things attached to earth.

(a) things rooted in earth; E.g.: trees, shrubs excluding standing timber, growing crops, grass etc.

(b) things imbedded in the earth; E.g.: wall and buildings, minerals etc.

c) things fastened for the permanent beneficial enjoyment of anything embedded to earth. E.g.: windows, doors, ceiling fan etc.

Ceiling fan may be regarded as an immovable property, if it is fixed for permanent beneficial enjoyment. If it is meant for temporary purpose it is not an immovable property.

The above definition also is not comprehensive but it is an improvement on the first one.

Indian Registration Act, 1908: Section 2(6) of the Act, defines 'Immovable Property' as "immovable Property includes land, buildings, hereditary allowances, rights of ways, lights, ferries, fisheries or any other benefits arising out of land and things attached to the earth but not standing timber, growing crops or grass".

This definition is a better one since it has covered many items. This definition also excludes standing timber, growing crops and grass.

If the above three definitions are viewed together, it is clear that they do not tell us what immovable property is. They only tell us what is either included or not included therein. In all the above three definitions, the last three things viz. standing timber, growing crops and grass are excluded from the definition since they are severable from the land.

Correct idea of immovable property: The negative definition of the T.P.Act and the positive definition of the General Clauses Act as stated above are if taken together, we succeed in giving correct idea of immovable property as follows:

"Immovable property" means, 'land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth'.

It is clear from the above that the term 'immovable property' includes three things namely land, benefits to arise out of land and things attached to earth. It excludes three things namely, standing timber, growing crops and grass.

The expression "Attached to earth is defined under Section 3, Para 6 of the T.P.Act as follows:

"Attached to the earth" means–

(a) rooted in the earth, as in the case of trees and shrubs;

(b) embedded in the earth, as in the case of walls or buildings; or

(c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.

(a) Things rooted in the earth: According to the definition, trees and shrubs come within the meaning of the immovable property subject to exception as to standing timber.

(b) Things embedded in the earth: The word 'embedded' means "a thing whose foundation is laid well below the normal surface of the earth." E.g.: walls and buildings.

(c) Things fastened to things embedded for its permanent beneficial enjoyment: This category includes the cases of doors, windows, ceiling fans, etc. These are fastened to walls and ceilings, for the permanent beneficial enjoyment of the room or house. These are, therefore, things attached to earth and immovable property. But ornamental fittings, festivities, electrical appliances and other decorations though fastened to walls, doors, etc. are not so attached for the simple reason:

(i) that these are not permanent but only transitory and occasional;

(ii) and, are not in any sense beneficial to the wall or door.

Therefore, these are not immovable properties.

Standing Timber, Growing Crops and Grass are Movable and Immovable: The Transfer of Property Act, Indian Registration Act and General Clauses Act have excluded standing timber, growing crops and grass from the definition of immovable property and regarded them as movable property. However, they are not regarded movable at all times. If the transaction is confined/limited only to the present, the property is said to be movable. If the transaction extends to future also, the property is regarded as immovable.

For instance : If there is a sale of trees to be cut and taken away, it relates to movable property. If the contract to cut the trees subsists for next 10 years, it relates to the transfer of immovable property. Relevant case law as stated below explains on this point.

Marshall vs. Green, 33 LT 400 : 24 WR 75: In this case, the transaction was a sale of trees to be cut and taken away immediately. It was held that it was not the sale of any interest in land but merely of timber, which formed the subject matter of a transfer to be movable property. On the principle stated in this case it has been held that fruit-bearing trees are immovable property when the intention of the parties is that the fruit of the trees should be enjoyed and not that the trees should be cut down for use as timber. When what is sold is only the right to cut and enjoy the trees as timber, no interest in immovable property is transferred. If such a right extends over a period of years, it is an interest in immovable property.

Seeni Chettiar vs. Santhanathan, 330 Mad. 58 (FB) – In this case, it was held that right to cut trees (as and when they grow) for a period of four years, relates to immovable property and it requires registration.

Ansari vs. Board of Revenue, AIR 1960 AP 399 – In this case, the right to take away beedi leaves, bamboos and standing timber over a period of one year was held to be not immovable.

Ananda Behra vs. State of Orissa (1956) SCJ p-96 – In this case, it was held that such a right to catch fish from lake/pond arising out of immovable property, i.e. lake/pond. Therefore, the sale 'right to catch fish' from lake/pond requires a registered instrument for its validity under Section 54 (Sales) of the Transfer of Property Act, 1882.

The right to catch and carry away fish is a Profit-a-Prendre, being benefit arising out of land is immovable property.

State of Orissa vs. Titaghur Paper Mills Company Limited (1985) SC 1293 – In this case, the Government of Orissa and Titaghur Paper Mills Company Limited entered into a contract, for the supply of bamboo, and the company would pay money for the right to cut bamboo from the forest and for a number of years. The State Government, thereafter levied sales tax on the company, treating the bamboo contract as movable. The company resisted it.

Problem: 'A' orally grants 'B' for Rs.700/- the right to catch and carry away fish from his lake. Is the grant valid?

Ans.: The right in question relates to movable property. The sale may be oral. The Supreme Court in – *Ananda Behra vs. State of Orissa* (1956) SCJ p-96 held that such a right is a benefit arising out of immovable property namely, the lake. It comes within the meaning/purview of immovable property under the General Clauses Act, 1897. The sale requires registered instrument for its validity under Section 54 of the T.P.Act. Therefore, the oral grant is invalid and cannot pass away any title in favour of 'B'.

What are immovable property: Following are the judicially recognised immovable property.

(i) The equity of redemption.

(ii) Right to collect rents of immovable property.

(iii) A right of ferry.

(iv) A right of fishery.

(v) A debt secured by mortgage of immovable property.

(vi) A hereditary office under Hindu Law.

(vii) A right to receive future rents and profits of land.

(viii) A pension or other periodical allowances granted in permanence.

(ix) The right to collect lac from trees.

(x) Reversion in property leased.

(xi) A right to tap coconut trees and obtain toddy.

(xii) A right to sever and collect tendu leaves.

(xiii) A right to graze cattle or mow grass.

(xiv) The interest of a mortgagee in immovable property.

(xv) A vested remainder.

(xvi) Coal land.

(xvii) A pumping installation when fastened to the earth in a permanent manner.

(xviii) A priest's right to recover dues at a funeral.

(xix) A right to assessment.

(xx) A tenancy right.

What are not immovable property:

(i) Standing timber, growing crops and grass.

(ii) A royalty.

(iii) A right to recover maintenance allowance.

(iv) Right to worship.

(v) Right to collect offerings from Yajman.

(vi) Amount payable by a Yaman to a Panda.

(vii) A right to obtain specific performance of an agreement to sell.

(viii) A copyright.

(ix) Brit Jajani books.

(x) Interest of a partner in the partnership.

Distinction between movable property and immovable property:

Following are the notable points of distinction between movable property and immovable property.

Movable Property	Immovable Property
1. The movable property can easily be shifted/transported from one place to another without any loss or damage. E.g.: goods.	1. The immovable property cannot be shifted/transported from one place to another without any loss or damage. E.g.: land, buildings etc.
2. Registration of the transfer of movable property under the Indian Registration Act, 1908 is not compulsory, but optional.	2. Registration of Transfer of immovable property is compulsory under the Indian Registration Act, 1908 if the value of the property is Rs.100/- or above.
3. Movable property is subject to General Sales Tax of the State concerned or The Central Sales Tax Act, 1956.	3. Immovable property is not subject to Sales Tax, but is liable for stamp duty under Indian Stamps Act, 1899 and registration fee under the Indian Registration Act, 1908.

2. ATTESTED OR ATTESTATION
[Section 3]

Meaning: The expression 'Attestation' means "to sign and witness the fact of execution of a document by the executant." 'Attest' means to testify a fact, to bear witness to fact. Attestation in relation to a document signifies the fact of authentication of the

signature of the executant of that document by the attestor by putting down his own signature on the document in testimony of the fact of its execution. The term 'attested' in Section 3 of the T.P.Act means that a person has signed the document by way of testimony of the fact that he saw it (document) executed. It runs as follows:

'Attested', in relation to an instrument, means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other persons, and each of whom, has signed the instrument in the presence of the executant, but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Attestation is an important formality in execution of transfer. All transfers do not require attestation. It is necessary in certain cases like gift, mortgage etc., and optional in case of sale, lease etc.

Attestation is valid and complete, when two witnesses sign the instrument. The object of attestation is to ensure that there is no fraud or vitiating circumstance in the execution of a document.

The Transfer of Property (Amending) Act XXVII of 1926, added a definition of 'attested' in Section 3 of the Transfer of Property Act in terms of the definition of Indian Succession Act, thus sanctioning attestation on acknowledgement of execution. So, Act X of 1927 amended the definition by adding after the word 'attestation' means the words 'and shall be deemed always to have meant'. This amendment makes it clear that the definition of 'attestation' has retrospective operation. Shamu vs. Patter's case is no longer good law.

Essentials or requisites: An attestation to be valid, the following conditions are to be satisfied.

1. Definition under section is confined to only to non-testamentary instrument. It will not apply to wills etc.
2. Minimum two attesting witnesses are needed. Maximum is not mentioned.
3. Three modes of attestation are recognised, e.g.:
   (i) Each sees the executant signing or fixing mark; or
   (ii) Each sees some other person signing in the presence and by the direction of the executant; or
   (iii) Each has received from the executant the personal acknowledgement
      (a) of executant's sign
      (b) of Executant's mark
      (c) sign of one who signed for the executant in his presence and by his direction.
4. Each witness signs the instrument in presence of executant.
5. Presence of both or all attesting witnesses one and at the same time is not essential.
6. No particular form of attestation is prescribed.

Qualification of Attestor: An attestor must be a major, and a person of sound mind. He may be literate or illiterate. A party to the deed should not attest. The Sub Registrar of Stamps and Registration is not competent person to attest the document.

Effect of invalid attestation: Where attestation is compulsory, it must be attested properly. Otherwise, it is ineffective. According to Section 59 of the Act, if a mortgage deed is not duly attested, it cannot be enforced in a Court.

Case Law

Kundan Lal vs. Mushar (5 PC 207) – In this case the executant was a pardanashin lady and was sitting behind a thin curtain when the attestators signed. The Privy Council held that the attestation was valid as the executant, if so minded, could have seen the witnesses, even if she did not actually see them, through the curtain. It is tantamount to say that an attesting witness should sign his name in the presence of the executant.

Rao Ganga Prasad Singh vs. Isturi Prasad Singh (34 MLJ 545 (PC) – In this case deed of mortgage was signed behind the purdah and was brought to the witness bearing a signature which the son of the lady said was her signature. The Privy Council held that there was no valid attestation because for a valid attestation, the attestator must have actually witnessed execution or received from the executant an acknowledgement of execution. Similarly in Padarath Halwai vs. Ram Narayan Upadhya (37 All 474 (PC), the hand of the executant who was behind the purdah was seen and her voice was heard and recognised by the witness. It was held that the attestation was valid.

Sant Lal Mahtan vs. Kamala Prasad **(1951)** – In this case a mortgage-deed was written by the scriber on 8-4-1927. On the same day, the mortgagor did not sign. But the attesting witness signed on the mortgage deed on 8-4-1927. The mortgagor signed the mortgage-deed on 12-4-1927. The Supreme Court held that it was not a valid attestation. The attesting witness should sign after the executant signed, only then it would become valid attestation. Otherwise, there is no value for the attestation in the eye of the law.

Distinction between English Law and Indian Law

Following are the notable points of distinction between English Law and Indian Law with regard to the rules of attestation.

English Law	Indian Law
1. English Law insists on the presence of two witnesses at the time of attestation.	1. The presence of two witnesses is not compulsory/necessary at the time of attestation.
2. The rules of attestation are rigid/strict.	2. The rules of attestation are flexible/liberal.

3. ACTIONABLE CLAIM
[Section 3]

Meaning: Actionable claim is an act or claim for which an action can be instituted in civil court for realisation of the benefit. It means

(i) any unsecured debt; or

(ii) any interest in movable property, not in possession of the claim.

An actionable claim is a claim to take legal action for realisation of the benefit. In England, it is called 'chose in action' or 'a thing in action'.

Definition: The definition of actionable claim was given in the original Act. However, the definition under the original Act was too wide since it covered every act or claim for which an action would lie in the civil court. The Transfer of Property (Amendment) Act, 1930 has narrowed the definition. Section 3 of the T.P.Act, 1882 defines 'Actionable Claim to be a claim':

(1) to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property; or

(2) to any beneficial interest in movables not in possession actual, or constructive of the claimant;

(3) which the civil courts recognise as affording grounds for relief whether such debt or beneficial interest be existent accuring, conditional or contingent.

In brief, an actionable claim means:

(i) any unsecured debt; or

(ii) any interest in immovable property, not in possession of the claimant.

The constituents of the above definition may be explained as follows:

1. Unsecured Debt: The claim under actionable claim may be an unsecured debt (i.e. a debt without security). Debts secured by a mortgage of immovable property or by a pledge of movable property are not actionable claims.

E.g.: 'X' owes Rs.5,000/- to 'Y' against a promissory note. 'Y's claim is actionable claim.

2. Beneficial Interest in Movable Property: A right to claim benefit in a contract of purchase of goods is a beneficial interest in movable property.

E.g.: 'A' agrees to sell 100 bags of wheat to be delivered on a future date. 'B' has a beneficial interest and is an actionable claim.

Instances of Actionable Claims: Following are some of the instances of actionable claims: Right to claim benefit under a contract of purchase of goods; Claim under insurance policy, amount standing at the credit of provident fund account; Share in partnership, arrears of rent etc.

Instances of Claims, not actionable: Share in a company, copyright, mortgage debt, right to recover damages for breach of contract etc.

The provisions relating to mode, effect or assignment of actionable claim and the liability of the assignee are provided in Sections 130 to 132 of the Act.

Assignment of Actionable Claims: Sections 130 to 132 of the Act deal with assignment of actionable claims. The expression 'assignment' literally means 'transfer'. According to Section 130

of the T.P.Act, every actionable claim can be transferred by means of a separate instrument in writing duly stamped and signed by the assignor or his duly authorised agent.

Actionable claim may be assigned by way of sale, mortgage, gift or exchange. Registration is not necessary. It takes effect from the date of assignment.

Notice (Section 131): Notice of assignment should be given to the debtor so as to enable him to pay the creditor after assignment. The assignee in his own interest must give notice to the debtor. Then, the debtor is liable to pay to assignee only. According to Section 131 the notice:

(1) must be in writing;

(2) must contain the name and address of assignee; and

(3) must be signed by assignor or his authorised agent and on refusal, it must be signed by assignee or his agent.

4. NOTICE
[Section 3]

Notice literally means knowledge as to existence of certain facts. Section 3 of the T.P.Act defines 'Notice'. The last paragraph of Section 3 says that under what circumstances a person is said to have a notice of a fact or going to have the knowledge of the same. It runs as follows:

'A person is said to have notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I – Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of, or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or,

where the property is not all situated in one sub-district, or where the registered instrument has been registered under sub-section (2) of section 30 of the Indian Registration Act, 1908 (16 of 1908), from the earliest date on which any memorandum of such registered instrument has been filed by any Sub Registrar within whose Sub District any part of the property which is being acquired, or of the property where in a share or interest is being acquired, is situated:

Provided that:

1. the instrument has been registered and its registration completed in the manner prescribed by the Indian Registration Act, 1908 (16 of 1908), and the rules made thereunder;
2. the instrument or memorandum has been duly entered or filed, as the case may be, in books kept under Section 51 of that Act; and
3. the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under Section 55 of that Act.

Explanation II – Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III – A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material.

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice thereof as against any person who was a party to or otherwise cognizant of the fraud.

Kinds of Notice: Notice is of Three kinds, namely:

1. Actual or Express Notice;
2. Constructive or Implied Notice; and
3. Notice to Agent or Imputed Notice.

1. Actual or Express Notice: It is a notice, by which the person acquires actual knowledge of the fact. It requires actual or real information about the fact and should not be a vague report or rumor.

Actual notice, to constitute a binding force, must be definite information given by a person interested in the thing in respect of which the notice is issued. In other words, the party imputing notice must show that the other party had knowledge, which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired.

The notice must be given in the same transaction. A person is not bound by notice given in a previous transaction which he may have forgotten. Notice to a purchaser by his title papers in one transaction will not be notice to him in an independent subsequent transaction in which the instruments containing recitals are not necessary to his title, but he is charged constructively with notice merely of that which affects the purchase of the property in the chain of title of which the payer forms the necessary link.

Bina Muralidhar Hemdev and others vs. Kanhaiyalal Lokram Hemdev and others, (1999) 5 SCC 222 – There were four partners of an unregistered partnership. Late Muralidhar Lokram Hemdev (husband of Bina Muralidhar Hemdev) was one of the partners. The partnership firm purchased 31,075 sq.feet in Thane for construction of apartments and to do business. Disputes arose and the partners partitioned the property. The partition deed was registered. Thereafter a rectification deed was also registered. Muralidhar Lokram Hemdev died.

Kanhaiyalal Lokram Hemdev and others, partners of a registered firm, purchased the said site from the remaining three partners, and started construction. Bina Muralidhar and her children filed a suit against them and sought for injunction restraining their construction. The defendants pleaded that they were bonafide purchasers and they did not know about unregistered firm and Muralidhar's share in it.

The Supreme Court gave judgement in favour of Bina Muralidhar Hemdev.

2. Constructive Notice: It is a notice, which treats a person who ought to have known a fact, as if he actually knows it. It is a presumed or implied notice. The doctrine of constructive notice said Lord Brougham in *Kennedy vs. Green*, depends upon two considerations; first, that certain things existing in relation or the conduct of parties, or in the case between them, begets a presumption so strong of actual knowledge that the law holds the knowledge to exist, because it is highly improbable it should not, and next, that policy and safety of the public forbids a person to deny knowledge while he is so dealing as to keep himself ignorant or so as that he may keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge. The legal presumption takes place in the following cases:

(i) Wilful abstention from an enquiry or search;
(ii) Gross Negligence;
(iii) Registration as Notice;
(iv) Actual possession as notice;
(v) Notice to Agent; and
(vi) State of property amounts to notice.

(i) Wilful abstention from an enquiry or search: If a person being aware of the fact did not make an enquiry which he ought to have made, then, he is deemed to have notice of that fact.

Kausalsi Ammal vs. Shankarmthiar, AIR 1941 Mad. 707 – It was held that the use of the word 'wilful' in the definition shows that the abstention from inquiry should be designed and due to a desire to avoid an inquiry which would lead him to ultimate knowledge. It means such abstention from inquiry, as would show want of bona fides.

Bank of Bombay vs. Sulaiman, 33 Bom. 1 (PC) – Sulaiman left his house and land to his sons by his first wife and appointed them the executors of his will. By the will he bequeathed Rs.30,000 to the sons by his second wife charging it on the property given to

the sons by the first wife. The first wife's sons borrowed from the Bank depositing the title deeds of the house and land as security. If the Bank had made inquiries as to how the mortgagee derived title from Sulaiman, they would have had cognizance of the will and so of the charge in favour of the second wife's sons. They were, therefore, fixed with constructive notice of the charge, which accordingly prevailed over the mortgage to the Bank.

(ii) Gross Negligence: Constructive notice applies, when a person, but for his gross negligence would have known the fact.

Lloyds Bank Ltd. vs. P.E.Guzder and Co. (1929) 56 Cal 868 – A deposited title deeds of his property with Bank N to secure an overdraft. A then asked for a return of the deed saying that he wished to sell property and clear the overdraft. The usual practice is for the prospective purchaser to inspect the title deeds in the office of N's solicitors. But A said that he would not get a good price if the purchaser came to know that N has deeds whereupon N returned the deeds to A. A then borrowed money from Bank L on the deposit of the same deeds, solely representing that there was no encumbrance. Bank N is guilty of gross negligence in surrendering the title deeds to A, and therefore, the mortgage to L has priority over the mortgage to N.

(iii) Registration as Notice: Constructive notices are applicable in cases where documents are required to be registered. One can identify the title of a person in property by observing the documents.

Registration of a document under the Registration Act is a constructive notice of its contents. Where a document need not be registered compulsorily, its registration does not amount to constructive notice.

Explanation – 1 of 'Notice' to Section 3 of the Transfer of Property Act has been enacted incorporating the 'Registration of a Document' as a 'Constructive Notice' to the subsequent transferees. Registration, under Explanation-1 will operate as notice, if the following conditions are fulfilled:

1. Transaction relating to immovable property is required by law to be registered and has been affected by a registered instrument.

2. Such property or any part thereof or share or interest in such property is acquired by a person.

Hirendranath vs. Rajendra Chandra (1974 A.M. 43) – A partition deed contained a clause of pre-emption. One brother in breach of this clause sold the property allotted to him in the partition to a third party without first offering to other brother. The purchaser was unaware of the pre-emption clause. Then the other brother sued for specific performance of the pre-emption clause. The Court held that the third person is bound, if he had the notice of the partition deed. Here the question was whether registration amounts to constructive notice. A Hindu partition is not compulsorily registerable. So registration does not operate in this case as constructive notice.

(iv) Actual possession as notice: Any person acquiring any immovable property shall be deemed to have notice of title if any, of any person who is in actual possession thereof.

Explanation II was introduced in the Transfer of Property Act by the Amending Act 21 of 1929. It settles the law that actual possession is notice of such title as the person in actual possession has. Before the insertion of Explanation II, there was difference of opinion as to how far possession was to be regarded as notice. The High Courts of Allahabad, Bombay and Madras had held that possession amounted to notice of such title as the person in actual possession may have. The Calcutta High Court on the other hand had held that possession is not conclusive but only cogent evidence of notice. This difference of judicial opinion necessitated amendment in the Act.

Krishnamma vs. Suranna (6 MLJ 54 (FB) and *Nani Bibi vs. Hafizullah* (10 Cal 1073) – It was held that possession, though not conclusive, was very cogent evidence of the title of the person in possession. The basis of this view was that whoever purchases an estate from an owner knowing it to be in the possession of another was bound to make inquiry into the title of the person in possession

and if he did not do so, he must be taken to have constructive notice of such title either on the ground of wilful abstention from an inquiry which he ought to have made or of gross negligence (*Sharfuddin vs. Govind*, 27 Bom 452). The principle is found enacted also in Section 27 of the Specific Relief Act, one of the illustrations, which runs as follows:

"A contracts to sell land to B for Rs.5000. B takes possession of the land. Afterwards A sells it to C, for Rs.6000. C makes no inquiry to B relating to his interest in the land. B's possession is sufficient to affect C with notice of his interest, and he may enforce specific performance of the contract against C."

(v) Notice to Agent: Notice through agency is defined in Explanation III to Section 4 of the Transfer of Property Act. The general rule is that notice to the agent is the notice to the principal on the basis of vicarious liability. This rule also is subject to certain limitations. Notice should have been received by agent.

(a) during the agency;

(b) in his capacity as an agent;

(c) in the course of the agency business; and

(d) in the manner material to the agency business.

Communication by agent to the principal is not necessary.

Exception: Fraudulent concealment of fact by agent does not amount to notice to the principal.

(vi) State of property amounts to notice: Sometimes the situation and condition of a property speaks louder than the man. A necessary inference, therefore, may be drawn about the probable users thereof, for example situation of tombs in any field is notice of the fact that the land has been and would be used for burial purposes. The Statue of Ravana in a ground points out the holding of Ram Lila there; the marks left by egress and ingress may operate as notice of right to way.

3. Imputed Notice: The word 'impute' literally means "to attribute or to ascribe". A notice to an agent is also called as 'Imputed Notice'. The expression 'Imputed Notice' was first coined

by Lord Chelmsford, who said: '....Constructive notice properly so called, is the knowledge which the Courts impute to a person upon a presumption so strong of the existence of the knowledge, that it cannot be allowed to be rebutted, either from his knowing something whom ought to have put him upon further inquiry, or from his wilfully abstaining from inquiry, to avoid notice. I should, therefore, prefer calling the knowledge which a person has either by himself or through his agent, actual knowledge or if it is necessary to make a distinction between the knowledge which a person possessed himself, and that which is known to his agent, the latter might be called Imputed Knowledge.'

Explanation-III to Section 3 of the Transfer of Property Act explains that a person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which the fact is material. If the agent wilfully and fraudulently conceals the fact, then the principal shall not be charged with notice.

The Privy Council observed: 'It is a rule or law that imputes the knowledge of the agent to the principal for the agency extends to receive a notice on behalf of the principal of whatever is material.'

Conditions: To constitute imputed notice, the following conditions are to be satisfied:

1. The agent should have received the notice during his agency.
2. The agent must act as an agent in his capacity as agent.
3. The notice must be received in the course of business.
4. It must relate materially to the agency business.
5. It should not have been fraudulently withheld from the principal.

The first four conditions are seen in the Explanation-III to ection 3. The fifth condition is seen in the proviso to the :planation-III.

LECTURE – III

TRANSFER OF PROPERTY

The Transfer of Property Act, 1882 mainly deals with transfer of immovable property between two living persons, i.e. transfer inter vivos. It also deals with the transfer of movable property. Sections 5 to 37 of the Act lay down the provisions relating to transfer of property, whether movable or immovable. This lecture deals with Part-I of Chapter-II containing Sections 5 to 9. It covers the following heads:

1. Transfer of Property : Definition (Section 5).
2. What property may be transferred and what property cannot be transferred (Section 6).
3. Capacity to Transfer or persons competent to transfer (Section 7); and
4. Oral Transfers (Section 9).

1. TRANSFER OF PROPERTY

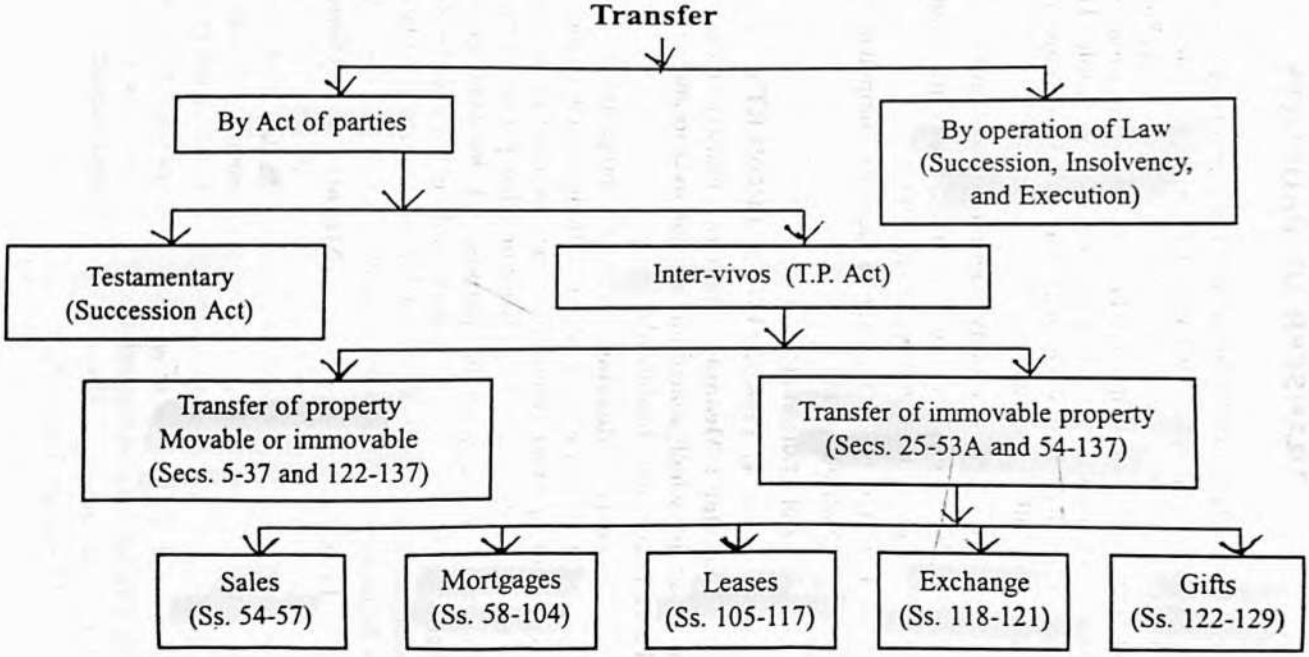
Transfer : Meaning: The term 'transfer' means a process or an act by which something is made over to another. However, the transfer is not absolute always.

Property : Meaning: The word 'property' may be used in the objective sense of a physical thing which is the subject of ownership or other rights; or it may be used in the sense of the rights and interests of the owner or other person in the property. The word property for the purposes of the Transfer of Property Act is not restricted only to physical thing but goes beyond what is seen, touched or felt by a layman but much ahead what law considers to be property. It includes the right to let cattle graze on property.

Transfer of Property : Meaning & Definition: The expression Transfer of Property means 'passing of a right in the property from one person to another. In one case there may be passing of entire bundle of rights from transferor to transferee, but in another case, there may be transfer of only some of such rights i.e. partial interest. In other words, the transfer of property under the T.P.Act may be the transfer of absolute interest in the property (E.g.: Sale, Gift etc.) or the transfer of limited interest in the property (E.g.: Mortgage, Lease etc.).

Transfer of Property : Definition (Section 5): Section 5 of the Transfer of Property Act, 1882 defines 'transfer of property' as follows:

SCHEME OF THE TRANSFER OF PROPERTY ACT, 1882


Transfer
By Act of parties
By operation of Law (Succession, Insolvency, and Execution)
Testamentary (Succession Act)
Inter-vivos (T.P. Act)
Transfer of property Movable or immovable (Secs. 5-37 and 122-137)
Transfer of immovable property (Secs. 25-53A and 54-137)
Sales (Ss. 54-57)
Mortgages (Ss. 58-104)
Leases (Ss. 105-117)
Exchange (Ss. 118-121)
Gifts (Ss. 122-129)

Transfer of property means an act by which one living person conveys property in present or in future to–

(a) one or more other living persons; or

(b) to himself; or

(c) to himself and one or more other living persons and to transfer property to perform such act.

In this section 'living persons' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

The second paragraph has been added by the (Amending) Act of 1929, in order to make it clear that the words 'living person' embraced Companies and Societies, and that general provisions of this Act as to transfers do not affect the special provisions of the Indian Companies Act.

By observing the above definition we may analyse it as follows:–

(1) Transfer of property is an act. Every act leads to some consequence. Here transfer also leads to a consequence i.e. conveyance of rights in the property from one person to another.

(2) The consequence of the act may be in present or in future.

(3) Although the transfer of property may be in present or in future but the property should be in existence at the date of transfer and so there is no transfer of future property.

(4) The conveyance must be from one living to another living. So it is not applicable to conveyance from one dead to another living person (Except Secs.13 to 16 and 22).

The words 'living person' includes a company or association or body of individuals whether incorporated or not.

We now see whether the following are transfer or not according to the T.P.Act.

Partition:

Partition is not a 'transfer' because there is no new right obtained by one co-sharer on partition. Since it does not devolve any new right on the co-sharer except separation of a right, which is already vested in him. It is an adjustment in the existing right and does not create any new right and so it is not a transfer.

Charge:

Charge on property is not a transfer within the meaning of Section 5 of the T.P.Act, as there is no transfer of interest made in favor of charge holder except the right to payment out of the property subject to charge.

Relinquishment:

A relinquishment by a reversioner of his reversionary interest does not amount to transfer. Because it connotes the extinction of right and there is nothing left to transfer.

Easement:

Creation of an easement is not a transfer.

Surrender of lease:

Surrender of a lease is not a transfer. In surrender, lessee's interest falls into the lessor's greater interest and so no new right is transferred in this process.

Dedication of property:

Dedication of property to an idol or temple is not a transfer within the meaning of this section.

2. WHAT PROPERTY MAY BE TRANSFERRED AND WHAT PROPERTY CAN NOT BE TRANSFERRED (Section – 6)

Section 6 of the Transfer of Property Act lays down that property of any kind may be transferred except as provided under the Act or any other Law for the time being in force. The words 'property of any kind' indicate that Transferability is the general rule and the right to property includes the right to transfer the property to another person. Property of any kind excludes from its purview the future property. A transfer of future property can only operate as a contract, which may be specifically performed when the property comes into existence.

What property may be Transferred and what property cannot be Transferred: Section 6 Clause (a) to (i) of the T.P.Act lay down the provisions relating to what property may be transferred and what property cannot be transferred. It runs as follows:

Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby.

(c) An easement cannot be transferred apart from the dominant heritage.

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred.

(e) A mere right to sue cannot be transferred.

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable.

(g) Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred.

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby; or (2) for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872 (9 of 1872); or (3) to a person legally disqualified to be transferee.

(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

What property may be Transferred?

Right to property includes the right to transfer property or interest, absolute or limited in the property. Property of any kind may be transferred except those enshrined in Clause (a) (i) of Section 6 of the Transfer of Property Act and any other law for the time being in force may declare such property as not transferable.

What property cannot be Transferred?

Section 6 of the Transfer of Property Act provides for the general rules that all kinds of property is alienable/transferrable. However, certain exceptions are provided under Clauses (a) to (i). In other words, the following properties, which are contained in clauses (a) to (i) of Section 6 of the T.P.Act are not transferable/ alienable–

(1) Spes Successionis [Section 6(a)].

(2) Mere Right of Re-entry [Section 6(b)].

(3) Easement [Section 6(c)].

(4) Personally restricted interest [Section 6(d)].

(5) Right to future maintenance [Section 6(dd)].

(6) A mere right to sue [Section 6(e)].

(7) Public offices [Section 6(f)].

(8) Stipends and Pensions [Section 6(g)].

(9) Unlawful Transfers [Section 6(h)]; and

(10) Others or certain other occasions [Section 6(i)].

(1) Spes Successionis (Section 6(a): The expression 'Spes Succcessionis' means "mere chance or hope of succession". The right of a person to inherit to another in future is a mere chance, which may or may not happen and hence, it cannot be transferred. In other words, mere hope to get the property of another cannot be transferred.

In England transfer of spes successionis is ineffective. However, an assignment is valid on equitable grounds provided, it is for valuable consideration. In India, spes successionis is a nullity (null and void).

Illustration: (1) A, a Hindu owning separate property, dies leaving a widow B and a brother C. C has only a bare chance of succession (Spes Successionis) and this chance of succeeding to the property cannot be transferred. C's succession to the estate is dependent upon two factors, i.e. (i) his surviving the widow B and (ii) B leaving the property intact.

(2) A dies leaving two widows and a reversionary heir B. The widows set up a will, which authorised them to adopt a son. B filed a suit challenging the validity of the will and in order to raise money for the litigation transferred his share to C. The Court set aside the will. On the death of the widows B entered possession of A's estate. C sued B but C's suit was dismissed as B at the time of

the transfer, had spes successionis in A's estate and, therefore could not transfer it.

(3) A expecting that C, his aunt, who had no issues, would bequeath her house worth Rs.50000, transfers it to B. The transfer is invalid.

Amrit Narayana vs. Gaya Singh (1918 L.R. 45 IA 35) – In this case the guardian of a minor reversioner entered into a compromise with the female holder by which the properties were relinquished in favour of other relatives. In a suit by the reversioner for possession of properties after the death of the female holder, it was held that the Hindu reversioner has no present interest in the property so long as the female holder is alive. His right becomes concrete only when she dies, until then it is a mere chance of succession. Hence the compromise was void.

Anand Mohan vs. Gour Mohan (50 Cal. 929 PC) – In this case a Hindu widow was in possession of property. If she died B would have taken the property as a reversionary heir. Even before A's death B entered into a contract with C to sell the property to him and C agreed to put in possession whenever A dies. Subsequently A died. C sued for specific performance of contract. The Privy Council held that the contract is for transfer of a spes successionis and so such transaction is not valid. This suit was dismissed.

(2) Mere right of re-entry [Section 6(b)]: Section 6(b) provides that a mere right of re-entry for breach of a condition subsequent cannot be transferred to any one, except the owner of the property affected thereby.

By a mere right of re-entry is meant a right to resume possession of land, which has been given to another person for a certain time. This right of re-entry is usually inserted in leases empowering the lessor to re-enter upon the demised premises if the rent is in arrear for a certain period or if there is a breach of covenants in the lease. In other words, in a contract of lease, the

lessor has a right of re-entry. A mere right of re-entry cannot be transferred. The lessor alone can enjoy this right and he cannot transfer it to any other except lessee who is affected thereby.

Illustration: (1) A grants a lease of a plot of land to B with a condition that if B shall build upon it, he would re-enter. A transfers C his right of re-entering in case of breach of the covenant not to build. The transfer is invalid for two reasons, one, the right is a personal license and not transferable, second, the transferee could only use it for the purposes of a suit to enforce the right without acquiring any right in the property. But if A transfers the whole of his interest in the property, i.e. ownership along with the right of re-entry to C, the transfer shall be valid being a legal incident of the property.

Vaguram vs. Rangayyanagar (31 All 304) – In this case the lessee committed a breach of the covenant to pay rent and incurred forfeiture. Thereupon, the lessor leased the lands to another with a right to take possession of the land from the tenant in default. It was held that the transfer was not invalid by reason of Section 6(b) for the assignment was not of a right of re-entry but of the reversion following upon the forfeiture.

(3) Easement [Section (c)]: The term 'Easement' means "right over the property of another i.e. right in re aliena". In Mohammedan Law, they are called 'Neighbors' rights.

Section 6(c) provides that an easement cannot be transferred apart from the dominant heritage. An easement is an incident of the ownership of the dominant heritage and passes with it. Therefore, it cannot be separated from the dominant heritage and transferred separately.

An easement includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to or subsisting upon, the land of another. An easement is a right. It cannot be separated from the property on

which easement exists. Therefore, only easement cannot be transferred.

Illustrations: (1) A has an easementary right to get the water from the well of B. A cannot transfer this easementary right to any third person.

(2) A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B. A transfers this right of way to C. The transfer is a transfer of easement and therefore invalid. But if A transfers the house itself, the easement passes on to C on such transfer.

It must be noted that the section refers to the transfer of an existing easement and not to the creation of an easement. The creation of an easement is not transfer of property. The section has also no application to release of an easement.

(4) Personally restricted interest [Section 6(d)]: Certain interests in a property are to be enjoyed by the owner alone and cannot be transferred to any one. A person having right to a property can transfer the same either subject to a restriction or without restriction. Where property is transferred subject to a restriction the transferee is supposed not to act contrary to the restriction. Thus, if property is transferred to the transferee with a restriction that it is to be enjoyed by him personally, he shall have no right to transfer such a property and if he transfers the property in violation of the restriction, the transfer shall be void under this clause. E.g.: A priest in a temple or a house is lent to a person for his personal use, he cannot transfer his right of enjoyment to another.

Illustration: A transfers his house to B for solemnization of marriage of B's daughter. After the marriage is over B allows C to use the house for his residence and pay rent for use and occupation of the house to B. Here transfer of house of B to C is void under this clause because it was given to him for his personal use, i.e. solemnization of his daughter's marriage. The object of the rule is that if it were allowed to be transferred it might defeat the very

purpose underlying the restriction and it would be manifestly inconsistent with the presumed intention of its founder. Property may be restricted to personal enjoyment either by law or custom or the conditions of grant.

(5) Right to Future Maintenance [Section 6(dd)]: A right to future maintenance is solely for the personal benefit of the person to whom it is granted and hence, cannot be transferred. This Clause (dd to Section 6) was added by the Amendment Act of 1929. Before the insertion of this clause in 1929, there was a conflict of opinion whether the right to future maintenance when it was fixed by a decree was transferable. It was held in Madras that it was (*Ranee Annapurni vs. Swaminath*, 34 Mad. 7) and in Calcutta that it was not (*Asad Ali vs. Haider Ali*, 38 Cal. 13). The amendment supersedes the Madras decision. The result is that the assignment of a decree for maintenance is valid if the maintenance has already become due but as to future maintenance it is not valid. Arrears of maintenance, therefore, can be assigned.

Nandarani vs. Krishna (1935 ALJ 715) – In this case there were disputes between Smt. Nandrani and her husband. Husband did not provide any maintenance. There was an agreement between Krishna-creditor and Smt. Nandrani that she would transfer the future maintenance that would be granted by the court against her husband. For this purpose, Krishna gave loan for expenses incurred in the legal proceedings. After the court gave judgment in favour of Nandrani, Krishna asked her to transfer the decree in his favour. She refused to do so. He filed a case against her for specific performance of contract.

The Madras High Court gave judgment in favour of Smt. Nandrani holding that future maintenance should not be transferred.

The right of a Hindu widow to maintenance is a personal right and from its nature is incapable of assignment. But arrears of maintenance can be attached and sold like any other debt. At the same time, the right to future maintenance cannot be transferred.

(6) A mere right to sue [Section 6(e)]: Clause(e) of Section 6 provides that a mere right to sue cannot be transferred. To 'sue' means to make a legal claim or to take legal proceedings against any person. It does not necessarily imply institution of a suit by means of a plaint, such as is referred to in the Code of Civil Procedure. It rather implies the taking of any legal proceedings in matters of any kind, e.g. right to sue for a breach of a contract or tort. Thus a mere right to sue of whatever nature cannot be transferred in law. It is said that a stranger to a contract (suit) cannot sue. Only parties to the suit alone can sue and be sued since it is a personal right. However, there are certain exceptions to this rule.

Illustration: 'A' carries on business of transporting goods from one place to another. He transfers to 'B' the right to sue for damages for breach of contract relating to the business. Here transfer of the right to sue in favour of B is affected by this clause because the right to sue is intimately connected with the business and is an important item of its assets. But if A assigns his business to B, he will get the right to sue automatically. It is not transfer of a mere right to sue. A claim for compensation for use and occupation against a tenant holding over is a mere right to sue and cannot, therefore, be transferred.

(7) Public offices [Section 6(f)]: Public offices or Salary of public officer cannot be transferred. The prohibition is imposed on the basis of the public policy. The expression 'public office' has not been defined in the Act. A public office is a position which has a public duty attached to it. It does not matter whether the person holding the office receives any fee or salary for the performance of such duty or not or whether he receives it from Government or otherwise.

(8) Stipends and Pensions [Section 6(g)]: Stipends and pensions allowed to Army, Navy, Airforce and Civil, Government

and Political pensioners cannot be transferred. Pension means a periodical allowance or stipends granted not in respect of any right to office but on account of past services on particular merit. Thus, a bonus or a reward is not pension. An allowance granted for other considerations is not within the prohibition and can be transferred. A pension is also exempt from attachment under Section 60 (g) of the Code of Civil Procedure, 1908. Similarly, scholarships, Medals, Rewards etc. cannot be transferred.

(9) Unlawful Transfers [Section 6(h)]: Unlawful Transfers provides 'No transfer can be made (1) in so far as it is opposed to the nature of interest affected thereby, or (2) for an unlawful object for consideration within the meaning of Section 23 of the Indian Contract Act, 1872, or (3) to a person legally disqualified to be a transferee.'

A transfer of property in consideration of doing a murder is void. Similarly, a transfer of property whose object or consideration is 'future illicit cohabitation' is void. A transfer of property, for 'past illicit cohabitation' is also bad in law and therefore is void.

Object: The object of this clause is based on public policy and public welfare.

(10) Others or Certain other occasions [Section 6(i)]: Section 6 Clause (i) explains certain other occasions in which transfers are not permitted. They are–

(1) A tenant, having untransferable right of occupancy, cannot transfer his right of tenancy.

(2) A farmer of an estate in respect of which default has been made in paying revenue is not permitted to transfer the estate.

(3) A lessee of an estate, under the management of a Court of Wards, is not allowed to transfer his interest.

3. CAPACITY TO TRANSFER OR PERSONS COMPETENT TO TRANSFER [Section 7]

Section 7 of the Transfer of Property Act, 1882 provides for the persons competent to transfer a property. According to Section 7, any person can transfer a property provided the following conditions are satisfied:

(i) he must be competent to contract; and

(ii) he must have title to the property or authority to transfer the property, if it is not his own.

Section 7 runs as follows:

Every person competent to contract and entitled to transfer the transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property, either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner, allowed and prescribed by any law for the time being in force.

(i) Competent to Contract: A person in order to enter into a contract must possess/fulfil the following conditions.

(a) he/she must be a major (or must not be a minor);

(b) he/she must be of sound mind (sane) or must not be of unsound mind (insane); and

(c) he/she must be qualified by the law in force or must not have been disqualified by law in force to contract (E.g.: Insolvent, Alien enemy etc.)

(ii) Entitled to transferable property or authorised to dispose of not his own: The second requirement is that the transferor must either be entitled to the transferable property or where property belongs to someone else, he must have authority of the owner of property to dispose of the same. A person not entitled

to the transferable property, E.g.: a trespasser cannot make a valid transfer of the property. Where a person purports to transfer another's property he must show that he has right to do so as an agent, or a guardian of the owner or a trustee or the like. The extent of the power of transfer depends upon the interest of the transferor or the limitation upon his authority.

If above mentioned conditions are fulfilled the transferor can transfer property either wholly or in part, either absolutely or conditionally in the circumstance to the extent and in the manner allowed and prescribed by any law for the time being in force.

4. ORAL TRANSFERS
[Section 8]

Section 9 of the Transfer of Property Act lays down that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. In other words, transfer of property may be affected under the Act both orally as well as in writing.

The following transfers are expressly permitted by this Act to be effected orally or without writing:

(i) Sales of tangible immovable property of a value of less than Rs.100. Section 54.

(ii) Mortgages by deposit of title deeds and mortgages (other than simple mortgages) where principal money secured is less than Rs.100. Section 58(f) and Section 59.

(iii) Leases of immovable property not being one from year to year or for any term exceeding one year reserving a yearly rent. Section 107.

(iv) Exchange of immovable property of a value less than Rs.100. Section 118 read with Section 54.

(v) Gifts of movable property. Section 123.

Transfer of property may be affected under this Act both orally as well as in writing. The following transfers can be made in writing only:

(i) Sales of tangible immovable property of the value of Rs.100 or upwards or of a reversion or other intangible thing of any value. Section 54.

(ii) Simple mortgage irrespective of the amount involved, and other mortgages of such property (other than mortgage by deposits of title deeds) when the principal sum secured is Rs.100 or upwards. Section 59.

(iii) Lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent. Section 107.

(iv) Exchanges of immovable property of the value of Rs.100 or upwards. Section 118 read with Section 54.

(v) Gift of immovable property. Section 123.

(vi) Transfer of actionable claims. Section 130.

LECTURE IV

CONDITION RESTRAINING ALIENATION AND CONDITION RESTRAINING ENJOYMENT

[Sections 10 & 11]

Sections 10 and 11 of the Transfer of Property Act, 1882 deal with Restraint on Transfers or Rule against Inalienability. Section 10 deals with the rule/condition restraining alienation and Section 11 deals with the rule/condition restraining enjoyment.

1. CONDITION RESTRAINING ALIENATION

[Section 10]

Transfer of Property from one person to another includes the right to own, right to enjoy and the right to dispose/alienate without any restraint or restriction/condition. If the transferor imposes any condition/clog on the transferee not to transfer further, such condition/clog is called 'Rule against Inalienability' and is void under Section 10 of the T.P.Act and the transferee can simply ignore/deny such condition. In other words, further/subsequent transfer by the transferee is valid and the condition imposed on transferee by the transferor is void. Section 10 runs as follows:

"Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: Provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Mohammedan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein."

Illustrations:

(i) A sells his property to B with a condition that if B sells the said property in future, he must sell to A or to any

member of A's family, on the rate of which he purchased. This is a restraining condition. It is not valid.

(ii) Two brothers partitioned their ancestral property. The partition deed has a clause that if any one of the brothers wants to sell his share, he must sell his property to the other brothers. The condition is invalid.

(iii) A makes a gift of the property to B, with a condition that B must enjoy the property during his life time. If he wants to sell the property, he must sell to A only at the half of the market value. The condition is invalid.

Ingredients: To attract Section 10, the following ingredients are to be satisfied:

(i) Any transfer of property the subject matter is transfer of property or there must exist transfer of property;

(ii) The transfer is made/affected by imposing a condition or limitation; and

(iii) The condition/limitation imposes absolute restraint on alienation by the transferee.

Effect: The transfer from transferor to transferee is valid, but the condition imposed on transferee is void.

Underlying Principle: The principle underlying this section is that a right of transfer is incidental to, and inseparable from, the beneficial ownership of the property. An absolute restraint on that power is repugnant to the nature of the estate and exception to the very essence of the grant.

The principle contained in Section 10 is a self-evident proposition. One cannot transfer a property to its total destruction. The right of owner does not include the liberty to destroy the ownership. The owner can destroy the property if he so likes but he cannot destroy the ownership. Whosoever is the owner of an estate, he has freedom to deal with the property in the same way as was

done by the ex-owners. The owner has full liberty to transfer a property but has no right to make it non-transferable forever. It is not reasonable exercise of the liberty to make the property non-alienable with the help of condition or limitation in this regard.

Kinds of Restraint: The condition restraining alienation may be two kinds, namely:

(i) Absolute Restraint; and

(ii) Partial Restraint.

(i) Absolute Restraint: As stated above, if the transferor, while transferring the property imposes on transferee not to transfer further, such condition/clog is called 'absolute restraint'.

E.g.: A sells his property to B with a condition that B should not dispose it to any body. It is absolute condition, which restricts the transferee absolutely to transfer. So it is void.

Exceptions: The rule that absolute restraint is void is subject to certain exceptions as stated below:

(i) Lease; and

(ii) Married Woman.

(i) Lease: In case of a lease, the lessor can impose a condition that the lessee shall not sublet the property or sell his leasehold interest. Such condition is valid.

(ii) Married Woman: The second exception is made in respect of a married woman, who is not a Hindu, Buddhist or Muslim. A property may be transferred to or for the benefit of a married woman, so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein. Section 8 of The Married Women's Property Act, 1874 as amended by the Act 21 of 1929 provides that even a decree against a married woman cannot be executed by sale of the property, which she is restrained from alienating during her marriage.

(iii) Partial Restraint: Where a property is transferred from one person to another, if the transferor imposes a condition/clog/ restriction on transferee, whereby the transferee is partially abandoned/restrained from alienating the property such restraint is called partial restraint. For instance, in a settlement of the joint family property, if the members are required to sell their share only to other family members and not allowed to sell the property to the outsiders, such restraint is called partial restraint and is valid.

E.g.: A transfers his property to B with a condition that if B transfers the property, A shall have a right of pre-emption, is valid.

2. CONDITION RESTRAINING ENJOYMENT [Section 11]

Section 11 of the Transfer of Property Act, 1882 lays down that condition in restraint of enjoyment is void. It means, when a property is transferred from one person to another, if the transferor imposes any condition/clog on the transferee restraining him from enjoyment of the property, such restraint by the transferor is void. Such a condition would be repugnant to the interest created and the transfer is deemed to have been made as if there was no condition at all. The transfer is valid and the transferee can ignore/deny such restraint.

Section 11 of the Transfer of Property Act provides that 'A condition repugnant to the interest created is void.' This Section corresponds with Section 138 of Indian Succession Act.

Section 11 of the T.P.Act and Section 138 of the Indian Succession Act read as follows:

Section 11 (T.P.Act):

Section 11 Restriction repugnant to interest created – Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

Section 138 (Indian Succession Act, 1925):

Direction that fund be employed in particular manner following absolute bequest of same to or benefit of any person – Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the funds as if the will had contained no such direction.

Illustration:

(i) A sells his house to B and imposes a condition on B that B alone should reside in the house. The condition is void/ invalid.

(ii) A makes an absolute gift of a house to B with a direction that B shall reside in it. The gift is absolute and the direction is void. B may live in the house or not as he pleases.

Smt. Lilawati and Others vs. F.R.D.Suraj Bhan and another, AIR 1971 Punj. 87 – In this case the plaintiff sold 100 plots of land to the defendant. The sale was absolute but certain conditions relating to its enjoyment were introduced in the deed of sale as payment of a sum of two annas in every hundred rupee and *haq malkana* to the vendor. The Court held that the defendant is not bound by the conditions.

The purpose of Section 11 is to facilitate the enjoyment of the property transferred by sale, or gift where full ownership is given to the transferee.

Ingredients: To constitute (to attract Section 11) the following conditions are to be satisfied.

(i) Absolute interest is created in favour of the transferee by the transfer.

(ii) Terms of the transfer provide that the interest in the property shall be enjoyed or applied in the manner prescribed by the transferor.

Exception to Section 11: The exception made by the second paragraph is a recognition of the rule that the transfer may impose conditions restraining the enjoyment of land if such restrictions are for the benefit of his adjoining land. This section relates to the enforcement of the restriction against the transferee. In simple words, there is an exception to the general rule under Section 11. That is, if a person transfers a plot of land keeping another plot to himself, he can impose certain conditions, which may interfere with the rights of enjoyment of the transferee.

Illustrations: A has properties X and Y. A sells property Y to B and puts a condition that B should not construct on the property Y more than one storey so that A's property X, which he retains should have good light and free air.

Thus, it is clear from the above that a condition imposed by transferor for the benefit of another property or to safeguard property is valid.

LECTURE V

TRANSFER FOR BENEFIT OF UNBORN PERSON

[Sections 13 and 14]

Sections 13 and 14 of the Transfer of Property Act, 1882 lay down the provisions relating to 'Transfer for benefit of unborn person'. Section 13 refers to 'Transfer for benefit of unborn person, while Section 14 speaks about 'the Rule against perpetuity'. Section 13 represents the common law rule against the remoteness of limitation, while Section 14 represents the English rule against perpetuity. Therefore, this lecture deals with–

1. Transfer for benefit of unborn person (Section 13).

2. Rule against perpetuity (Section 14); and

3. Rule against Accumulation or Direction for Accumulation (Section 17).

1. TRANSFER FOR BENEFIT OF UNBORN PERSON

[Section 13]

The Transfer of Property Act, 1882 deals mainly with the transfer of immovable properties between two living persons, i.e. transfers inter vivos. According to Section 5 of the Act, the general rule is that, both the parties to a transfer of property must be living persons. The expression 'living person' includes "juristic person" viz. Company or association or body of individuals, whether incorporated or not. Section 13, which deals with transfer by born to unborn is a special law and is an exception to this general rule i.e. transfer inter vivos. Section 13 runs as follows:

Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

Illustration:

A transfers property of which he is the owner to B in trust for A and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for A's second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of A's remaining interest in the property.

This Section (Section 13 T.P.Act) corresponds to Section 113 of the Indian Succession Act, 1925, which runs as follows:

Section 113: Bequest to person not in existence at testator's death subject to prior bequest – Where a bequest is made to a person not in existence at the time of the testator's death, subject to a prior bequest contained in the will, the latter bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.'

Illustrations:

(1) Property is bequeathed to A for life, and after his death to his eldest son for life, and after the death of the latter to his eldest son. At the time of the testator's death, A has no son. Here the bequest to A's eldest son is a bequest to a person not in existence at the testator's death. It is not a bequest to the whole interest that remains to the testator. The bequest to A's eldest son for his life is void.

(2) A fund is bequeathed to A for his life, and after his death to his daughters. A survives the testator. A has daughters some of who were not in existence at the testator's death. The bequest to A's daughters comprises the whole interest that remains to the testator in the thing bequeathed. The bequest to A's daughters is valid.

(3) A bequeaths a sum of money to B for life, and directs that upon the death of B the fund shall be settled among his daughters,

so that the portion of each daughter may belong to herself, for life, and may be divided among her children after her death. B has no daughter living at the time of testator's death. In this case the only bequest to the daughters of B is contained in the direction to settle the fund, and this direction amounts to a bequest to persons not yet born of a life interest in the fund, that is to say, of something which is less than the whole interest that remains to the testator in the thing bequeathed. The direction to settle the fund upon the daughters of B is void.

Who is an unborn person: An unborn person is one, who is not in existence or who is yet to born or who will come into existence in future at any time or who is not even in uterus (in the womb of mother).

Scope of the section: A person who is not in existence can neither be a transferee of property, nor a beneficiary under a trust until he comes into existence. There can, therefore, be no immediate transfer of property or trust in favour of a person not in existence. The principle is recognised by this Act as well as by the Indian Trusts Act. Section 5 of this Act provides that 'transfer of property' means a transfer in favour of a living person; and the expression 'living person' will not include a person, not in existence. Similarly Section 9 of the Indian Trusts Act, 1882, provides that a beneficiary under a trust must be a person 'capable of holding property' and this expression also excludes a person not in existence. However, Section 13 of the T.P. Act as stated above is an exception to this general rule.

For every property, there must be an owner. Naturally a person may wish to adopt a device to retain the property in his own family. Section 13 makes provision to such persons to retain/sustain the property within their family members, who will come into existence in future. If a person/testator is allowed to reserve his properties from generation to generations, it leads to certain problems/complications. The object of Section 13 is to regulate/ harmonise such transfers.

Conditions: For transfer of property to an unborn person, the following conditions are to be satisfied.

(i) No direct transfer: There can be no transfer of property for the benefit of an unborn person directly, but through the machinery of trusts. In case a trust is not created, the interest in favour of an unborn person must always be preceded by a prior interest in favour of a living person. This condition is intended that if it is made directly to unborn person, the property will be leftout without the owner after the death of testator or transferor and before coming into existence of unborn transferee. So it should not be kept in abeyance without ownership.

(ii) Prior Interest: Life interest may be created upon the existing persons till an unborn person comes into existence – In case a trust is not created, the property must be held by some persons who existing at the time of transfer. They can enjoy the limited interest one after another or collectively.

(iii) Unborn person must come into existence before the death of last life estate holder: If the life interest is created one after another or collectively the unborn person must come into existence before the death of the last life estate holder. It is not necessary that the unborn person must come into the actual world, but it is enough that if he is in its mother's womb (a child inventre sa mere, is equals to a child in esse which means a child in the mother's womb is equal to a child in existence).

(iv) The whole remaining interest must be vested to unborn person the moment he comes into existence: When an unborn person gets the actual life, he will be the absolute owner of the property which was created in his favour and the life estate holders cannot retain anything which remains in their hands. So they must give the entire interest to the unborn person.

If the above four conditions are satisfied the enjoyment of property may be postponed during period of minority of unborn beneficiary.

It is clear from the above that the transfer under Section 13 can be made/possible to an unborn person but not to the issue of the unborn person.

Sopher vs. Administrator General of Bengal (1944 PC 67) – In this case, A, a testator executed a will stating that his property shall be divided between the sons to be born, after the death of the testator and his wife. The income of each share was to be paid to each of sons/daughters and thereafter to the grand children until they attained the age of 18 years. The grand children after attaining their majority would only be entitled for the absolute rights on the property.

The Privy Council had considered the effect of Section 113 of The Indian Succession Act, 1925 in this case. Their Lordships had before them will which provided for an ultimate bequest in favour of persons not born at the time of the testator's death, and the question that arose for decision was whether the bequest comprised the whole of the testator's remaining interest in the thing bequeathed. Two clauses in the will provided for the forfeiture of the interests of the unborn beneficiaries in certain contingencies.

Before the passing of the Transfer of Property Act, 1882, transfer in favour of unborn person was not allowed. In 1872, the Privy Council in:

Tagore vs. Tagore (1872 ILR 356 PC) – laid down that a transfer even to one generation before it reaching to unborn person was not valid.

After the passing of the T.P.Act, transfer in favour of an unborn person is allowed. Section 13 is applicable to Hindus since Hindu Law allows transfers in favour of unborn persons. This Section is not applicable to Mohammedans. A gift to (unborn) a person not in existence is void except in the case of a waqf under Mohammedan Law (*Abdul Khadur vs. Turner,* ILR 9B 158).

English Law (*Rule in Whitby vs. Mitchell* (1890) 44 Ch.D.85) or the Rule of Double Possibilities: The principle laid down in

this section differs from the English Law. Before the Law of Property Act, 1925, transfer in favour of unborn person was governed by the rule laid down in *Whitby vs. Mitchell* (1890) 44 Ch.D.85) known as the Rule of Double Possibilities. The rule laid down in this case provided that if an interest in property is given to an unborn person, any remainder to his issue is void with all subsequent limitations. Thus, if land was limited to A, a living person for life, remainder to his daughter for life, (A having no daughter at the time of transfer), remainder to her children and their heirs, the life estate of A and his daughter were valid but the remainder to the daughter's children was void. After the passing of the law of Property Act, 1925 the rule in Whitby vs. Mitchell has been abolished and transfers in favour of unborn persons are governed by the rule against perpetuity. Now transfer of land in favour of A, a living person for life, then to his daughter for life (A having no daughter at the time of transfer), remainder to her children and their heirs is valid provided there is no infringement of the rule against perpetuity.

2. RULE AGAINST PERPETUITY
[Section 14]

Section 14 of the Transfer of Property Act deals with 'the Rule against perpetuity'. It is an extended provision of Section 13.

Meaning: The word 'Perpetuity' means, "tying up property for an indefinite period or for ever". 'Perpetual enjoyment' means, "enjoyment forever". Section 14 of the T.P.Act corresponds to Section 114 of the Indian Succession Act, 1925, which runs as follows:

No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest created is to belong.

Section 114 Indian Succession Act: "No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the expiratioin of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

Jarman defines perpetuity as "a perpetuity in the primary sense of the word is a disposition, which makes property inalienable for an indefinite period".

Principle: There are some persons, who wish to retain their properties in their own family from generations to generations perpetually. But it is the policy of the law to prevent the creation of perpetuities. Property cannot be tied up longer than for a life in being and beyond minority. This rule/principle is called 'the Rule against perpetuity'.

The policy of law has been to prevent property from being tied up forever. The rule against perpetuity has been founded on the general policy that liberty of alienation shall not be exercised to its own destruction and all contrivances which tend to create perpetuity or place property forever out of the reach of the exercise of the power of alienation shall be void.

Perpetuity may arise in two ways:

(1) by taking away from the owner of property the power of alienation thereof; and

(2) by creating future remote interest in the property.

The former case is covered by Section 10 of this Act and the latter is covered by this section.

The object of the rule against perpetuity is to restrain the creation of future conditional interest in property.

Ingredients: To attract Section 14, the following conditions are to be satisfied.

(i) There should be a transfer of property.

(ii) Transfer should be to create an interest in favour of an unborn person.

(iii) Interest so created must take effect after the lifetime of one or more persons living at the date of such transfer and during the minority of the unborn person.

(iv) The unborn person should be in existence at the expiration of the interest of the living persons.

Perpetuity period: Perpetuity period is one in which one cannot postpone the vesting of property in transferee beyond certain limit. It is the period of which vesting of interest may lawfully be postponed. Under this rule, the maximum period during which, the owner of the property can control its flow is prescribed.

Analysis of the Rule:

(1) The vesting cannot be postponed beyond the lifetime of any one or more persons living at the date of the transfer. For example, if an estate is given to a living person, A for life, then to a living person, B for life and then to the unborn son of B. Here the son of B must be in existence on or before the date of the expiry of the life estate in favour of B.

Stated in another way, the rule amounts to saying that, except in case of minority, discussed below, there must be no interest between the termination of the preceding interest of a living person and the vesting of the interest taken by the person who was not in existence at the date of the transfer.

(2) The vesting of absolute interest in favour of an unborn person may be postponed until he attains full age. For example, an estate may be transferred to A, a living person, and after his death to his unborn son when he attains the age of 18. Such a transfer would not be violative of the rule against perpetuity.

The extent of perpetuity period:

The perpetuity period, that is to say, the maximum period during which the property may be rendered inalienable, is the life of any person who is, or of the survivor of any number of persons who are alive at the moment when the deed which creates the interest begins to operate, plus a period of 18 years from the time when such designated person dies. For example, the owner of a property may transfer it to a living person, A, for life, and after his death to B, a living person, for life, and on or before B's death to his unborn son when he attains the age of 18. Suppose A remains alive for 10 years; B for 15 years and the unborn son comes into existence just before the death of B. As the unborn son would not get the property until he attains the age of 18, it follows that the property would remain tied up for 33 years.

Extent of perpetuity period : Position in India:

Life or any number of lives in being + period of gestation + minority period of the unborn beneficiary.

E.g.: Assume that A, B, C are the life estate holders who enjoyed the property. In that A enjoyed for 15 years, then B enjoyed for 20 years and C enjoyed for 10 years and died then the unborn person came into existence. Now perpetuity period is:

A B C M.P.

15 + 20 + 10 + 18 = 63 years.

In this case if the vesting of an absolute interest to an unborn person is more than 63 years, that is void on the basis of the 'rule against perpetuity'.

E.g.: A, B, C are the life estate holders who enjoyed the property. In that A enjoyed 15 years, then B enjoyed 20 years and C also enjoyed 10 years at the end of which the unborn person conceived and came into existence 150 days after the death of C. Now the perpetuity period is

A + B + C + P.G + M.P.

15 + 20 + 10 + 150 days + 18 years

Here the perpetuity period is 63 years and 150 days. So, vesting of property is more than 63 years and 150 days. It is void.

English Law:

Life or lives in being + period of gestation + minority period.

If we apply this rule to the above example, the perpetuity period is:

15 + 20 + 10 + 21 = 66 years

15 + 20 + 10 + 280 days + 21 = 66-280

Difference between English Law and Indian Law

English Law	Indian Law
1. Minority period is 21 years.	1. It is 18 years.
2. Period of gestation is a gross period.	2. It should be actual period.
3. Property need not be given absolutely to unborn person.	3. It should be given absolutely.
4. The unborn person must come into existence within 21 years of the death of last life estate holder.	4. He must come into existence before the death of the last life estate holder.

Exceptions to the rule against perpetuity: The rule against perpetuity allows the following exceptions.

(i) Public Charitable Trust: The rule does not apply in case of transfer for the benefit of the public i.e. advancement of religion, knowledge, commerce, health and safety.

(ii) Covenants of Redemption: This rule does not offend the convenants of redemption in mortgage.

(iii) Personal Agreements: It does not apply when the transfer creates only a personal obligation and does not affect the interest in the property.

(iv) Agreement for Pre-emption: Agreements for Pre-emption gives first as option to purchase land since the agreement to purchase does not cast any interest in the property. So this rule does not apply to the agreement or pre-emption.

(v) Provision for the Payment of the Debts of the Transferor: When a direction is given that the income of the property shall be accumulated for the payment of debts and it does not tie up the property totally because the person indebted can discharge the debt at any time.

(vi) Perpetual Lease: It is also not applicable to the contracts of perpetual renewal of leases.

3. RULE AGAINST ACCUMULATION 'OR' DIRECTION FOR ACCUMULATION

[Section 17]

The term 'Accumulation' literally means "increase of principal by re-investment of interest". Section 17 of the T.P.Act, 1882 speaks about the "Accumulation of Income of Property or Direction for Accumulation".

A direction for accumulation of income is a particular mode of restraining the enjoyment of property. According to the principle embodied in Section 11 such direction for accumulation would be void and inoperative. But this section provides an exception to Section 11 and permits a direction for accumulation of income to operate in certain cases.

(1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than–

(a) the life of the transferor; or

(b) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last mentioned period of the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of–

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer; or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer; or

(iii) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

Law prevents the storage of wealth for an unreasonable period of time by devices calculated to thwart the flow of property through the normal channels of transfer and succession.

The direction for accumulation of income of property is a particular mode of restraining the enjoyment of the property, which permits a direction for accumulation of income during either of the following two cases–

(i) the life of the transferor; or

(ii) a period of 18 years from the date of transfer (whichever is longer one)

E.g.: A transfers property to B in 1940 with a direction that the income arising out of the property is to be accumulated till

1970 (i.e. for 30 years). A dies in 1965. The period during which the transferor is alive is more than 18 years from the date of the transfer, but being the longer of the two periods, the direction is valid till 1965. If, however, the transferor dies in 1950, then longer period would be 18 years and accordingly the direction would remain valid till 1958.

The Rule against Accumulation under Section 17 of the T.P.Act is based on the leading English case–

Theluson vs. Woodford, 32 ER 1030 (H.L): T bequeathed his property upon trust to accumulate the income during the lives of his three sons and of all their descendants who might be living at his death and after the death of the last survivor of them to be divided among the then living eldest male descendants who might be living at his death and after the death of the last survivor of them to be divided among the then living eldest male descendants of his three sons. It was held that the direction regarding accumulation was valid, as it did not contravene the rule against perpetuity although the income might be placed beyond the reach of human enjoyment for a very considerable time.

Exceptions: Section 17 is subject to the following three exceptions:

(i) Payment of Debts.

(ii) Provision of portions or Accumulation for raising portions.

(iii) Preservation and maintenance of the property.

(i) Payment of Debts: A direction for accumulation for the purpose of the payment of the debts of either of the transferor or the transferee is valid. A makes a gift of a house to B. The income arising from the house is Rs.200 per month. A gives a direction that the rent of the house, Rs.200 should be applied in the payment of debts of A, amounting to Rs.50,000. The direction is valid.

(ii) Provision of portions or Accumulation for raising portions: The word 'portion' ordinarily means a share and points

to the raising of something out of something else for the benefit of some children or class of children. It does not apply to the making of additions of income to capital in order to increase the capital for the person to whom it is given.

(iii) Preservation and maintenance of the property: Any direction for accumulation of income for the purpose of preservation or maintenance of the property transferred is beyond the purview of Section 17(1). The provision should be to maintain the property at its present value. Thus, a fund to meet dilapidations at the end of a lease is within the exception. Directions to devote surplus income for maintaining building in a proper state of repair, or to apply a fixed annual income to keep up an insurance policy to replace the capital lost by not selling leaseholds are outside the rule against accumulations though they add income to capital, they merely keep up the property, and do not add to it, so that there is no true accumulation. They must be confined to the perpetuity period.

LECTURE – VI

VESTED INTEREST AND CONTINGENT INTEREST

(Sections 19 – 24)

Sections 19 to 24 of the Transfer of Property Act, 1882, lay down the provisions relating to two kinds of interests, namely:

(1) Vested Interest (Sections 19 to 22); and

(2) Contingent Interest (Sections 21 to 24).

Section 19 defines vested interest. Section 20 speaks about when an unborn person acquires vested interest on transfer for his benefit. Sections 21 and 22 relate to both vested and contingent interests. Section 21 defines contingent interest and as to when it (contingent interest) becomes vested. Section 22 deals with transfers to a contingent class. Section 23 deals with contingent interest. Section 24 deals with transfer to such of certain persons as survive at some period not specified.

1. VESTED INTEREST
[Sections 19 TO 22]

Meaning: When a person has fixed right of present or future possession of property he is said to have 'Vested Interest' in the property. An estate is said to be vested in possession, when it gives a present right to the immediate possession of property.

Where an interest is created in favour of a person, by transfer of property without specifying time or term, when it is to take place/effect, or on the happening of an event, which is certain. (Where a transfer of property creates an interest in favour of a person without specification as to when it happens, but happening is certain. Such interest is called vested interest).

In case of Vested Interest, a person on transfer of property gets an interest over a thing/object/property in future on happening

of an event. Within what time/term it happens is uncertain. But happening of the event is certain. (A person dies is certain, when dies is uncertain).

Example: 'A' transfers his land to 'B' for life and then to 'C'. Here, 'C' has vested interest. His (C's) interest depends upon the happening of an event i.e. the death of 'B', which is certain.

Definition (Section 19): Section 19 of the Transfer of Property Act defines 'Vested Interest'. It runs as follows:

Where, on a transfer of property, an interest therein is created in favour of person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation:– An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or where a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

This Section and the corresponding Section 119 of the Succession Act, 1925, deal with the question under what circumstances a person obtains a vested interest or immediate right on a transfer of property. It provides that unless a contrary intention appears from the terms of the transfer, a person gets a vested interest when it is created in his favour–

(1) Without specifying the time when it is to take effect; or

(2) In terms specifying that it is to take effect forthwith; or

(3) In terms specifying that it is to take effect on the happening of an event, which must happen.

The person having vested interest has proprietary interest, but the right of enjoyment is subject to happening of a future event, which is certain. When an interest is vested, it becomes the property of the transferee and is transferable by him (transferee) under Section 6 even before obtaining the possession.

Illustrations:

(1) A donates to B Rs.500 to be paid to him at the death of C. B acquires in Rs.500 a vested interest although he will be entitled to the possession thereof on the death of C only which is a certain event.

(2) A makes a gift of his house to B for life and after his death to C. Both B and C acquire vested interest in the house, the difference being that B's interest is both vested in interest and in possession and C's interest is vested in interest only.

(3) A plot of land is transferred to A, B and C in equal shares with a direction that it will be handed over to them on their becoming major. But if they die as minor the property shall go to E. A, B and C acquire a vested interest (vested in interest only) even during their minorities and will be entitled to possession of on their becoming major.

(4) A transfers the whole of his property to B upon trust to pay certain debts out of the income and then to hand over the property to C. C acquires a vested interest in the property. Here the payment of debts merely postpones enjoyment and not the vesting itself.

(5) A nominates B to receive the provident fund of A in the event of his death. B takes a vested interest in the fund even before A's death.

Vested Interest is Heritable: Where a transfer of property confers vested interest with an immediate right to possession and enjoyment of the property, such vested interest is not defeated (lost) by the death of the transferee (even before getting possession of the property).

When an interest is vested it becomes the property of the transferee and is under Section 6, transferable by him even before he has obtained possession; for a transfer of property not in possession is effective. If the transferee dies, his interest vests in his representatives whether or not he has obtained possession.

Rajes Kant Roy vs. Santi Devi, 1957 SCR 77 : (1957) ASC 255 : 1957 SCJ 197 : 1957 SCA 440 – In this case the Supreme Court gave its decision on vested or contingent interest. In this case father settled the property on his two minor sons. The settlement provided that the sons would obtain absolute interest in the property upon the death of the transferor and after discharging all his encumbrances. The Supreme Court held that sons got a vested interest, though enjoyment was temporarily postponed.

Unborn person acquires Vested Interest (Section 20): Section 20 deals with when unborn person acquires vested interest on transfer for his benefit. It runs as follows:

Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth.

According to Section 20 of the Act, an unborn person acquires vested interest in property transferred to him. But he/she is not entitled to the enjoyment immediately after the birth. An unborn person is one, who is not in existence i.e. a child in mother's womb.

2. CONTINGENT INTEREST
[Sections 21 to 24]

Where, on transfer of property, an interest is to take effect on the happening of an event, which is certain to occur, it is called vested interest. If the interest is to take effect on the happening of an uncertain event or contingency, it is called contingent interest.

In other words, an interest which arises upon contingency or happening of an uncertain event is called 'Contingent Interest'.

Example: 'A' transfers his land to 'B' for life and thereafter to 'C', if 'B' had no children. Here, 'C's interest is contingent because it is uncertain whether 'B' would have children or not.

Similarly, 'A' promises 'C' to transfer his property, if 'B' dies naturally below 30 years. Here 'C's interest is contingent.

Section 21 defines contingent interest as follows:

Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception: Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof may be necessary to be applied for his benefit, such interest is not contingent.

Illustrations:

(1) A grant provided that on the death of the last surviving widow of the late Raja of Tanjore, his daughter or failing her the next heir, if any, should inherit the property. It was held by the Privy Council that until the death of the last surviving widow, the interest created in favour of the daughter was only contingent on her surviving the last widow.

(2) X promised A, B and C, Rs.1,000/- each to be paid to them on the occasion of their marriage. It was held that the gift was contingent upon their marriage-taking place. A and C married before the X's death, and the contingency contemplated did not

therefore happen, with the result they did not take. B married after the death, and on such marriage, the gift became a vested one.

(3) A transfer was made "to A for life, then, to her adopted son; if she dies without adopting anybody then to B and her sons." B predeceased A. It was held that B had only a contingent interest the contingency being that A should die without making an adoption.

(4) A makes a gift in favour of his sons with a condition that if any one of them dies leaving no male issue, his share will be taken by the others, and not by the widow or daughter of the deceased son. In such a case, the gift creates a contingent interest.

Effects/Consequences of Vested and Contingent Interests:

(1) Where an interest is vested, the transfer is complete and the transferee acquires all rights over the property, it is transferable and heritable.

(2) Where an interest is contingent, the transfer is not complete and the transferee acquires no right over the property. (Until and unless the contingency/uncertain event takes place).

Distinction between Vested Interest and Contingent Interest

Vested Interest (Section 19)	Contingent Interest (Section 21)
1. It is subject to happening of an event, which is certain.	1. It is subject to happening of a contingency or an uncertain event.
2. Transfer is complete and transferee acquires all rights over the property.	2. Transfer is not complete and transferee acquires rights over the property only on happening of the contingency or uncertain event.
3. It is transferable and heritable.	3. It is transferable, but heritability depends upon nature of the interest.

Vested Interest (Section 19)	Contingent Interest (Section 21)
4. It is not subject to fulfillment of a condition.	4. It is subject to fulfillment of a condition.
5. If transferee dies before actual enjoyment, it passes to his heirs.	5. In such case, contingent interest fails and does not pass to heirs (of Transferee).

Questions and How to Answer

Q) Distinguish between vested and contingent interest?

Ans.) If the above is asked as an essay question write in detail about vested interest, contingent interest and then, the distinction between vested interest and contingent interest. In case, the question is asked as short notes, write in brief about vested interest and contingent interest and then, write the table containing the distinction between the two.

LECTURE – VII

CONDITIONS PRECEDENT AND CONDITIONS SUBSEQUENT

[Conditional Transfer : Sections 25-34]

Every person, who is competent to contract (under Section 11 of the Indian Contract Act, 1872) is also competent/entitled to transfer his/her property. When he wants to transfer the property upon fulfillment of a condition/obligation, such transfer is called 'Conditional Transfer'. The conditional transfer may take place in two ways, namely:

1. Condition Precedent; and
2. Condition subsequent.

Sections 25 to 34 of the Transfer of Property Act, 1882 lay down the provisions relating to Conditional Transfer. Section 25 provides for the general rule of all kinds of conditional transfers. According to Section 25, where the transfer of property is dependent upon a condition, the fulfillment of which is impossible or forbidden by law, such transfer is declared void. Sections 26 and 27 deal with the condition precedent and Sections 28 to 34 deal with the condition subsequent.

1. CONDITION PRECEDENT

[Sections 25-27]

Condition precedent means, a condition to be performed before an interest arises. (When a property is transferred, right/interest in property gets transferred). A condition precedent is one, which the vesting of a right until the happening of a specified event, i.e. condition. Sections 25 to 27 of the Transfer of Property Act, 1882 deal with Condition Precedent.

Section 25 lays down the general rule that, transfer takes effect, if a condition precedent is satisfied. If the condition precedent is–

(a) impossible; or

(b) forbidden by law; or

(c) of such a nature that, if permitted would defeat the provisions of any law; or

(d) fraudulent; or

(e) involves or implies injury to the person or property of another; or

(f) the court regards it as immoral or opposed to public policy

Such transfer is void/invalid. Section 25 runs as follows:

An interest created on a transfer of property and dependent upon a condition fails if the fulfillment of the condition is impossible, or is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.

Illustrations:

(1) A lets a farm to B on condition that he shall walk a hundred miles in an hour. The lease is void.

(2) A gives Rs.500 to B on condition that he shall marry A's daughter C. At the date of the transfer C was dead. The transfer is void.

(3) A transfers Rs.500 to B on condition that she shall murder C. The transfer is void.

(4) A transfers Rs.500 to his niece C, if she will desert her husband. The transfer is void.

Fulfillment of condition precedent: Section 26 refers to conditional transfer to one person coupled with transfer to another on failure of prior disposition. According to Section 26, the condition is deemed to have been fulfilled if it is substantially complied with.

Section 26 runs as follows:

Where the terms of a transfer of property impose a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

Illustrations:

(a) A transfers Rs.5,000 to B on condition that he shall marry with the consent of C, D and E. E dies. B marries with the consent of C and D. B is deemed to have fulfilled the condition.

(b) A transfers Rs.5,000 to B on condition that he shall marry with the consent of C, D and E. B marries without the consent of C, D and E, but obtains their consent after the marriage. B has not fulfilled the condition.

Section 27 relates to conditional transfer to one person coupled with transfer to another on failure of prior disposition. It runs as follows:

Where, on a transfer of property, an interest therein is created in favour of one person, and by the same transaction an ulterior disposition of the same interest is made in favour of another, if the prior disposition under the transfer shall fail, the ulterior disposition shall take effect upon the failure of the prior disposition, although the failure may not have occurred in the manner contemplated by the transferor.

But, where the intention of the parties to the transaction is that the ulterior disposition shall take effect only in the event of the prior disposition failing in a particular manner, the ulterior disposition shall not take effect unless the prior disposition fails in that manner.

Illustrations:

(a) A transfers Rs.500 to B on condition that he shall execute a certain lease within three months after A's death, and, if he

should neglect to do so, to C. B dies in A's lifetime. The disposition in favour of C takes effect.

(b) A transfers property to his wife but, in case she should die in his lifetime, transfer to B that which he had transferred to her. A and his wife perish together, under circumstances which make it impossible to prove that she died before him. The disposition in favour of B does not take effect.

(P.S.: Sections 25 and 26 are more important for condition precedent).

Characteristics of Condition Precedent: Following are the characteristic features of the condition precedent.

(i) the condition shall be fulfilled before the property/estimate is vested in the transferee;

(ii) the estate does not vest in the transferee until and unless, the condition is fulfilled;

(iii) the condition should not be declared void under Section 25;

(iv) the condition is deemed to be fulfilled, if it is substantially complied with under Section 26.

2. CONDITION SUBSEQUENT
[Sections 28-34]

A condition subsequent is one, which destroys or divests upon the happening of an event. It literally means, a condition, which has to be fulfilled after an interest is created upon the transfer of a property. Sections 28 to 34 lay down the provisions relating to condition subsequent.

Section 28 deals with conditional limitation. It refers to ulterior transfer conditional on happening or not happening of specified event. It runs as follows:

On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a

specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case the dispositions are subject to the rules contained in Sections 10, 12, 21, 22, 23, 24, 25 and 27.

An interest in the property transferred may be created in favour of any person with a condition that in case a specified uncertain event shall not happen such interest shall pass to another person. For instance, A transfers Rs.5000 to B with the condition that B joins the bar within three years from the date of the transfer and in case he does not join within the said period, the property is to go to C. In case B does not join the bar, C gets Rs.5000. In this illustration the transfer, in favour of C is an ulterior transfer, and it takes effect on the failure of the prior transfer. As regards the prior interest, the condition is a condition subsequent but as regards the ulterior disposition, it is a condition precedent.

The ulterior transfer (in the above illustration the transfer to C) is subject to the rules contained in Sections 10, 12, 21, 22, 23, 24, 25 and 27.

Illustrations:

1. A transfers his farm to B and then to C without power of alienation. The restriction is void under Section 10.

2. A transfers his land to B, and if B becomes insolvent, to C. The condition is void under Section 12.

3. A transfers his field to B and in case of B's death without issue to C. C's interest is contingent (Section 21).

4. A transfers his field to B and on B's death to such children of C who attain the age of 18. All the children of C who are alive at B's death have an interest as laid down in Section 22.

5. A transfers his field to B for life and on B's death to C at the age of 18. C does attain the age of 18 until 6 months after B's death. C's interest fails under Section 23.

6. A transfers his field to B and on B's death without issue, to the sons of C or the survivor of them. The sons of C who survive B become entitled to it under Section 24.

7. A transfers his field to B for life on the condition that B murders C and then after B's death to D. The transfer fails in both cases under Section 25.

Section 29 deals with fulfillment of condition subsequent. It runs as follows:

An ulterior disposition of the kind contemplated by the last preceding section cannot take effect unless the condition is strictly fulfilled.

Illustrations:

1. A field is transferred to A with a proviso that if he married without the consent of B, C and D, the field will go to E. D dies. Even if A married without the consent of B and C, the gift to E does not take effect.

2. A field is transferred to A with a proviso that if he married without the consent of B, the field shall go to C. A marries with the consent of B. The gift to C does not take effect because the condition once fulfilled is discharged.

3. A transfers Rs.500 to B to be paid to him on his attaining his majority or marrying with a proviso that, if B dies a minor or marries without C's consent, the Rs.500 shall go to D. B marries when only 17 years of age without C's consent; The transfer to D takes effect. Here, there has been a clear breach of the condition and therefore B is divested of his interest.

Section 30 deals with the effect of the invalidity of the ulterior disposition on the prior one and it provides that the prior disposition is not affected by the invalidity of the ulterior disposition. An ulterior disposition may be invalid because the condition on which it is dependent is illegal, too vague, impossible, too remote, opposed

to the rule laid down in Section 13 or is otherwise inoperative. It reads as follows:

If the ulterior disposition is not valid, the prior disposition is not affected by it.

Illustration: A transfers a farm to B for her life, and, if she does not desert her husband to C. B is entitled to the farm during her life as if no condition had been inserted.

Section 31 deals with a condition subsequent, which terminates an interest and reverts in the grantor. Section 31 provides for condition that transfer shall cease to have effect in case specified uncertain event happens or does not happen. It runs as follows:

Subject to the provisions of Section 12, on a transfer of property an interest therein may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen.

Illustrations:

1. A transfers a farm to B for his life, with a proviso that, in case B cuts down a certain wood, the transfer shall cease to have any effect. B cuts down the wood. He loses his life interest in the farm.

2. A transfers a farm to B, provided that, if B shall not go to England within three years after the date of the transfer, his interest in the farm shall cease. B does not go to England within the term prescribed. His interest in the farm ceases.

Section 32 speaks about invalid condition subsequent. According to Section 32, a condition, which would be void under Section 95 as a condition precedent is void under Section 32 as a condition subsequent. It runs as follows:

In order that a condition that an interest shall cease to exist may be valid, it is necessary that the event to which it relates be

one which could legally constitute the condition of the creation of an interest.

Section 32 provides a test for finding what conditions subsequent are valid. Following are the conditions void–

(i) Condition void for uncertainty.

(ii) Condition opposed to public policy.

(iii) Condition in restraint of marriage.

(iv) Condition, which is immoral.

(v) Condition, which is impossible for performance.

(vi) Condition as to Residence, where there is uncertainty as to it.

Section 33 provides that, when no time is fixed for the performance of a condition subsequent, it is broken not only when the person does an act, which renders the performance impossible, but also, when he does an act, by which the performance is definitely postponed. Section 33 runs as follows:

Where, on a transfer of property, an interest therein is created subject to a condition that the person taking it shall perform a certain act, but no time is specified for the performance of the act, the condition is broken when he renders impossible, permanently or for an indefinite period, the performance of the act.

Finally Section 34 speaks about the time for performance specified. It lays down that if the performance of a condition whether subsequent or precedent, is prevented by a person interested in its non-fulfillment, the delay is executed and the condition is discharged.

Section 34 is based on two maxims: fraud dolus nemin patrocinari debent (fraud and deceit ought not to benefit any person) and, nullus commodum capere potest de injuria sua propria (no one can take advantage of his own wrong).

This Section covers two classes of cases:

1. Where a time is specified for the performance of the act constituting the condition of the transfer and the fulfillment of the condition is prevented by the fraud of the person directly benefited by the non-fulfillment of the condition.

2. Where no time is specified for the performance of such act and the fulfillment of the condition is rendered impossible or is indefinitely postponed by the fraud of the person interested in the non-fulfillment of the condition.

Section 34 runs as follows:

Where an act is to be performed by a person either as a condition to be fulfilled before an interest created on a transfer of property is enjoyed by him, or as a condition on the non-fulfillment of which the interest is to pass from him to another person, and a time is specified for the performance of the act, if such performance within the specified time is prevented by the fraud of a person who would be directly benefited by non-fulfillment of the condition, such further time shall as against him be allowed for performing the act as shall be requisite to make up for the delay caused by such fraud. But if no time is specified for the performance of the act, then, if its performance is by the fraud of a person interested in the non-fulfillment of the condition rendered impossible or indefinitely postponed, the condition shall as against him be deemed to have been fulfilled.

Illustration: A testator directed that if any of the female members of his family lived for more than three months at any place other than a holy place they would forfeit their interest under his will. The forfeiture was not incurred when they were forcibly removed by their relation.

Distinction between Condition Precedent and Condition Subsequent: Following are the notable points of distinction between Condition Precedent and Condition Subsequent.

Condition Precedent	Condition Subsequent
1. In condition precedent, the estate is not vested in the grantee until the condition is performed/fulfilled.	1. In condition subsequent, the estate vests in the grantee immediately and remains in the grantee till the condition is broken.
2. It does not require strict compliance. Substantial compliance is enough/ sufficient.	2. It requires strict compliance or strict fulfillment of the condition is necessary.
3. If the performance of the condition precedent is impossible, both the condition precedent and the estate limited upon it are void.	3. If the performance is impossible, the condition subsequent fails, and the previous estate becomes indefeasible.
4. If the condition precedent is illegal, the property limited upon it, fails.	4. If condition subsequent is illegal, the previous estate becomes indefeasible and the condition is ignored.
5. By the performance of the condition an estate not previously vested, becomes vested.	5. By the performance of the condition, an estate previously vested becomes divested.

LECTURE – VIII

DOCTRINE OF ELECTION

[Section 35]

Section 35 of the Transfer of Property Act, 1882 deals with the Doctrine of Election. The word 'Elect' literally means, "to choose by vote or to decide on a course of action". The doctrine of election is an exception to the general/popular rule, *'Nemo dat quod non habet'* which means, "no one can convey a better title than, what he himself has". It is based on the principle of equity and is applicable to all kinds of properties, movable or immovable.

Suppose, a property is given to you and in the same deed of gift, you are asked to transfer something belonging to you to another person. If you want to take the property, you should transfer your property to someone else, otherwise, you cannot take the property, which is transferred to you by someone. Similarly, A transfers to you, one acre of his land and in the same deed of transfer, A asks you to transfer your house to C. Now, you have to elect whether to accept land at the cost of your house or to refuse the land to retain the house.

As stated above, election is an obligation to choose between two inconsistent or alternative rights in cases where there is a clear intention (express or implied) of the grantor that the grantee should not enjoy both the rights at once. The very foundation of this doctrine is that the person taking a benefit under an instrument must also bear the burden.

When a person wants to transfer property, which he has no right to transfer, confers in return some benefit on the owner of the property. Such owner must elect whether to confirm such transfer or to dissent from it.

Election when necessary (Section 35): Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of

the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of, subject nevertheless, where the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and in all cases where the transfer is for consideration, to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him.

Illustrations:

1. The farm of Sultanpur is the property of C worth Rs.800. A by an instrument of gift professes to transfer it to B, giving by the same instrument Rs.1000 to C. C, elects to retain the farm. He forfeits the gift of Rs.1000.

2. In the same case, A dies before the election. His representative must out of Rs.1000 pay Rs.800 to B.

The rule in the first paragraph of this section applies whether the transferor does or does not believe that which he professes to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benefit under it indirectly, need not elect.

A person who in his own capacity takes a benefit under the transaction may in another one dissent therefrom.

Exception to the last preceding four rules – Where a particular benefit is expressed to be conferred on the owner of the property which the transferor professes to transfer, and such benefit is expressed to be in lieu of that property, if such owner claims the property, he must relinquish the particular benefit but he is not bound to relinquish any other benefit conferred upon him by the same transaction.

Acceptance of the benefit by the person on whom it is conferred constitutes an election by him to confirm the transfer, if he is aware of his duty to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances.

Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred has enjoyed it for two years without doing any act to express dissent.

Such knowledge or waiver may be inferred from any act of his which renders it impossible to place the persons interested in the property professed to be transferred in the same condition as if such act had not been done.

Illustration: A transfers to B an estate to which C is entitled, and as part of the same transaction gives C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the transfer of the estate to B.

If he does not within one year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until some competent authority makes the election.

Section 35 lays down the principle of highest equity and applies to all classes of persons irrespective of their religion/personal laws.

Who can Elect: A person, getting some benefit in lieu of losing something can elect.

Underlying Principles of the Doctrine: The Doctrine of Election is borrowed from the English Equiry Jurisprudence basing on the following rules:

(1) The person taking the benefit must also bear the burden.

(2) The donee shall not be allowed to 'approbate and reprobate'. If he approbates, he shall do all in his favour to confirm the same.

(3) No one can blow 'hot' and 'cold' in the same breath.

The Doctrine of Election was stated by Maithland in the following words:

He, who accepts a benefit under a will or deed or any other instrument must–

(i) adopt the whole contents of the instrument;

(ii) confirm to all its provisions; and

(iii) renounce all the rights that are inconsistent with it.

Indian Courts applied the Doctrine in several cases, and it was observed that 'a person cannot approbate and reprobate the same'.

Underlying Principle: The underlying principle of the doctrine was enunciated by Lord Coirus in the leading case:

Cardington vs. Cardington, **1875 LR 7854** – That a person cannot accept that part of an instrument which is beneficial to him and reject the portion that imposes burden upon him. This decision was elaborately developed in:

Cooper vs. Cooper, **1874 LR HL 5** – In the instant case, 'X' gave certain property to a trustee to sell it after his widow's death. The sale proceeds in the property were to be used for his children. The widow gave (transferred) her self acquired property to her sons 'B' and 'C', and the deceased husband's property to 'A'. 'A' brought an action against 'B' and 'C' to choose (elect) between

their rights of inheritance or to accept the property under widow's deed. Held that, the doctrine of election would apply.

Conditions of the Doctrine: To attract Section 35, the following conditions are to be satisfied:

(1) There must be transfer of property.

(2) The transferor has to transfer the property of which he is not a real owner or has no authority to transfer.

(3) The transferor should confer some benefit upon the owner of the property, which he professes to dispose of.

(4) Disposal (of property) and conferment of benefit must be part of the same transaction.

(5) The benefit must be directly conferred on him.

(6) The beneficiary (put to election) should have an independent priority right.

The person put to election is called 'refractory donee' and the person who suffers is called the 'disappointed donee'.

Effect of Election: If the election is made to repudiate the transaction, the consequences that follow immediately are simple. He shall be relinquished of the benefit. Such benefit reverts (goes back) to the transferor.

Compensation to disappointed donee: If the donee elects against the instrument the transferor or his representative is liable to make good to the disappointed donee or transfer the amount of the value attempted to be transferred to him on two specific cases.

The two cases are:

(1) Where the transfer is gratutious and the transferor had before the election died or otherwise become incapable of making fresh transfer; and

(2) In all cases where the transfer is for consideration.

Time for Election: In English Law, no time is fixed. If the time is fixed and election does not take effect within the time, it is deemed to have been elected against the document. In India, the time fixed is one year. If the donee is silent, it is deemed to have been elected.

Mode of Election: Election may be direct or indirect. For direct election no form is prescribed and no formula is laid down. Any thing that conveys the intention clearly is sufficient for the purpose. A letter, telegram, a word spoken orally in presence and within hearing range of the transferor or any other sign made or marked at the desire of or to understanding of the transferor is enough. In case of indirect election, the following three modes are given in Section 351, Clauses 5, 6 and 7.

Exceptions to the Doctrine:

(1) In the absence of any condition stated above is satisfied.

(2) Where there is an express declaration to the contrary.

(3) Where they are not in the same instrument; and

(4) Grant by the Crown.

Indian Law: The provisions relating to the doctrine are enshrined (contained) in Section 35 of the Transfer of Property Act. Similar provisions are contained in Sections 180 to 190 of the Indian Succession Act.

Section 187 – When acceptance of benefit given by will constitutes election to take under will – Acceptance of a benefit given by a will constitutes an election by the legatee to take under the will, if he had knowledge of his right to elect and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives inquiry into the circumstances.

Illustrations:

(1) A is owner of an estate called Sultanpur Khurd, and has a life interest in another estate called Sultanpur Buzurg to which upon his

death his son B will be absolutely entitled. The will of A gives the estate of Sultanpur Khurd to B, and the estate of Sultanpur Buzurg to C. B, in ignorance of his own right to the estate of Sultanpur Buzurg, allows C to take possession of it, and enters into possession of the estate of Sultanpur Khurd. B has not confirmed the bequest of estate of Sultanpur Buzrug to C.

(2) B, the eldest son of A, is the possessor of an estate called Sultanpur. A bequeaths Sultanpur to C, and to B the residue of A's property. B having been informed by A's executors that the residue will amount to 5,000 rupees, allows C to take possession of Sultanpur. He afterwards discovers that the residue does not amount to more than Rs.500. B has not confirmed the bequest of the estate of Sultanpur to C.

Section 188 – Circumstances in which knowledge or waiver is presumed or inferred:

(1) Such knowledge or waiver of inquiry shall, in the absence of evidence to the contrary be presumed if the legatee has enjoyed for two years the benefits provided for him by the will without doing any act to express dissent.

(2) Such knowledge or waiver of inquiry may be inferred from any act of the legatee, which renders it impossible to place the persons interested in the subject-matter of the bequest in the same condition as if such act had not been done.

Illustration: A bequeaths to B an estate to which C is entitled and to C a coal-mine. C takes possession of the mine and exhausts it. He has thereby confirmed the bequest of the estate to B.

Section 189 – When testator's representatives may call upon legatee to elect – If the legatee does not within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will, the representatives shall, upon the expiration of that period, require him to make his election; and if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.

Section 190 – Postponement of election in case of disability – In case of disability the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

The Indian Courts have applied this doctrine in several cases. In *Ramakottaya vs. Viraghavayyal,* AIR (1929) Mad. 502 (F.B) LR 52 Mad. 556 – it was observed that a person cannot approbate and reprobate the same transaction. The Supreme Court has also considered the doctrine in *Bahu Ram vs. Baij Nath Singh,* AIR (1961) SC 1327; (1962) 1 SCR 358 – and *Beepathuma vs. Velasari Shankaranarayana Kadamguliaya,* AIR (1965) SC 241; (1964) 5 S.C.R. 836.

Mst. Dhanpatti vs. Devi Prasad and others, 1970 SCD 174 – The law pertaining to election is set out in Section 35(1) of the Transfer of Property Act. Before there can be an election there must be:

(1) a transfer of a property by a person who has no right to transfer;

(2) as a part of the same transaction, he must confer some benefit on the owner of the property; and

(3) such owner must elect either to confirm such transfer or to dissent from it.

In the instant case, the plaintiffs did not base their claim either on the ground of election or on estoppel. They sued solely on the basis of their title founded on the gift deed. No issue as regards election, or estoppel was framed nor any contention in that regard urged either in the Trial Court or in the first Appellate Court. The contention based on the doctrine of election appeared to have been raised for the first time in the High Court. Therefore, there was absolutely no basis for the finding reached by the High Court that the appellate had elected to accept half the suit property absolutely in lieu of her right to succeed to the estate as the heir on the death of her mother.

Distinction between English Law and Indian Law

English Law	Indian Law
1. The Doctrine is based on compensation.	1. Based on forfeiture.
2. No time limit is prescribed for election.	2. Time limit is one year (failure of which amounts to acceptance).
3. If the person to elect has disability, the court will elect for the disabled.	3. Election is postponed during the period of disability (E.g. Minority).

Suspension of election: The ninth and the last paragraph lays down that where the donee suffers from some disability by reason of infancy, lunacy and so forth, the election shall be postponed until the disability ceases or until the election is made by some competent authority, e.g. a guardian of a minor.

P.S.: Disability or Legal Disability refers to Minority or Insanity or Idiocy or Insolvency. A minor or insane person or Insolvent is legally disabled or incompetent to contract.

Questions and how to answer

Q. Explain the doctrine of election. Point out the differences in English Law and Indian Law with regard to its application.

Ans. It is a direct question. If it is asked as an essay question, write in detail about the doctrine of Election. In case, it is asked under short notes, write in brief about the doctrine of election and then write the table containing the differences between English Law and Indian Law.

The question on 'Election' may be asked indirectly as follows:

Q. That he who accepts a benefit under a deed or will or other instrument must adopt the whole content of that instrument must conform to the provision and renounce all rights that are inconsistent with it – Discuss.

Ans. This phrase refers to the doctrine of Election as explained under Section 35 of the Transfer of Property Act, 1882. Write now in detail, the doctrine of election.

LECTURE IX

APPORTIONMENT

[Sections: 36 & 37]

Apportionment – Meaning: The word 'apportionment' literally means "division in proportion" or to distribute/share proportionately. 'Apportionment' Wharton's Law Lexicon (14th Edition, 1938, p-70) describes, 'is a division of whole into parts proportionate to the rights of more claimants than one'. Apportionment frequently denotes not division but distribution and in its ordinary technical sense the distribution of one subject in proportion to another previously distributed.

Sections 36 and 37 of the Transfer of Property Act, 1882 lay down the provisions relating to apportionment. Under the Act, it is of two kinds, namely:

1. Apportionment by time (Section 36); and
2. Apportionment by estate (Section 37).

1. APPORTIONMENT BY TIME

[Section 36]

The principle of apportionment by time is based on the English Apportionment Act, 1870. Prior to this enactment, the Common Law of England did not recognise apportionment by time except in the case of interest on money but which accrued from day to day. In case of periodical payments, such as rent, the contract for each portion of rent was regarded at Common Law as distinct and entire. Consequently, this rule of common law led to anomalous results and was, therefore, altered by the Apportionment Act, 1870, Section 2 of which provides:

'From and after passing of this Act, all rents, annuities, dividends and periodical payments in the nature of income....shall, like interest on money but, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.'

The necessity for similar rule in Indian law arose out of the fact that under Section 8 of the Act transferee of a property acquired all interest in the property and income accruing from it only from the date of the transfer.

Section 36 deals with apportionment of periodical payments on determination of interest of person entitled. It runs as follows:

In the absence of a contract or local usage to the contrary, all rents, annuities, pensions, dividends and other periodical payments in the nature of income shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day, and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof.

Where any property, yielding periodical income is transferred, the question of division of that income between the transferor and the transferee arises. Section 8 of this Act provides that a transfer of property passes forthwith to the transferee all the interest, which the transferor is then capable of passing in the property and the legal incidents thereof. But this rule has no application to periodical incomes. Section 36 contains provision to that effect and provides that in the absence of a contract or local usage to the contrary, all rents, annuities, dividends and other periodical payments in the nature of the income shall, be deemed, as between the transferor and the transferee to accrue due from day to day, and to be apportionable accordingly, but shall be payable on the days appointed for the purpose.

This section applies between the transferor and the transferee only. It has no application between one of the parties to the transfer and a third party, and is limited where property has been transferred *inter vivos*.

The rule of apportionment enacted in this section is application only where there is no contract or local usage to the contrary. The contract to the contrary must be between the transferor and the transferee.

2. APPORTIONMENT BY ESTATE
[Section 37]

Section 37 deals with apportionment by estate. It pertains to apportionment of benefit or obligation on severance. It runs as follows:

When, in consequence of a transfer, property is divided and held in several shares, and thereupon the benefit or any obligation relating to the property as a whole passes from one to several owners of the property, the corresponding duty shall, in the absence of a contract to the contrary amongst the owners, be performed in favour of each owners in proportion to the value of his share in the property, provided that the duty can be served and that the severance does not substantially increase the burden of the obligation; but if the duty cannot be served, or if the severance would substantially increase the burden of the obligation, the duty shall be performed for the benefit of such one of the several owners as they shall jointly designate for that purpose.

Provided that no person on whom the burden of the obligation lies shall be answerable for failure to discharge it in manner provided by this section, unless and until he has had reasonable notice for the severance.

Nothing in this section applies to leases for agricultural purposes unless and until the State Government by notification in the official Gazette so directs.

Illustrations:

1. A sells, to B, C and D a house situated in a village and leased to E at an annual rent of Rs.30 and delivery of one fat sheep, B having provided half the purchase money and C and D one quarter each. E, having notice of this, must pay Rs.15 to B, Rs.7 1/2 to D, and must deliver the sheep according to the joint direction to B, C and D.

2. In the same case, each house in the village being bound to provide ten days' labour each year on a dyke to prevent inundation. E had agreed as a term of his lease to perform this work for A. B, C and D. D severally requires. E to perform the ten days' work due on account of the house of each. E is not bound to do more than ten days' work in all, according to such directions as B, C and D may join in giving.

Section 37 refers to apportionment by estate. Where the whole property or a share in the property is transferred to two or more persons, the benefit of an obligation relating to the property passes to the several owners of the property. In such a case, the obligation must be performed in favour of each of such several owners in proportion to the value of each share in the property. This rule is subject to the following conditions:

(a) the person on whom the burden of the obligation lies must have notice of the severance;

(b) the obligation must be such which can be severed; and

(c) severance should not increase the burden of the obligation.

Thus, when land subject to an entire money rent is held under a lease and the landlord sells half to A and half to B, the two moieties being of equal value, the tenant may be required to divide the rent equally between the two. The duty to deliver a sheep mentioned in the first illustration is not susceptible of severance. The other illustration exemplifies the second condition, noted above, that the burden of the obligation must not be increased.

LECTURE X

TRANSFER OF IMMOVABLE PROPERTY

Sections 38 to 53.A of the Transfer of Property Act, 1882 lay down the provisions relating to transfer of immovable property.

Section 38 deals with transfer by person authorised only under certain circumstances to transfer.

Section 39 deals with transfer where third person is entitled to maintenance.

Section 40 deals with burden of obligation imposing restriction on use of land, or of obligation annexed to ownership but not amounting to interest or easement.

Section 41 deals with transfer by ostensible owner.

Section 42 deals with transfer by person having authority to revoke former transfer.

Section 43 deals with transfer by unauthorised person who subsequently acquires interest in property transferred.

Section 44 deals with transfer by one co-owner.

Section 45 deals with joint transfer for consideration.

Section 46 deals with transfer for consideration by persons having distinct interests.

Section 47 deals with transfer by co-owners of share in common property.

Section 48 deals with priority of rights created by transfer.

Section 49 deals with transferees right under policy.

Section 50 deals with rent bona fide paid to holder under defective title.

Section 51 deals with improvements made by bona fide holders under defective titles.

Section 52 deals with transfer of property pending suit relating thereto.

Section 53 deals with fraudulent transfer.

Section 53.A deals with part performance.

This lecture covers in detail:

1. Transfer by an Ostensible Owner or the Doctrine of Holding out (Section 41)
2. Doctrine of Feeding the Grant by Estoppel (Section 43).
3. Priority of Rights (Section 48).
4. Improvements made by Bonafide Holders under the Defective Titles (Section 51).
5. Doctrine of Lis Pendens (Section 52).
6. Fraudulent Transfers (Section 53); and
7. Doctrine of Part-performance (Section 53.A).

1. TRANSFER BY AN OSTENSIBLE OWNER OR THE DOCTRINE OF HOLDING OUT [Section 41]

Meaning: Section 41 of the T.P.Act deals with transfers by Ostensible Owner. The word 'Ostensible' means "apparent or professed". 'Ostensible owner' means "as apparent owner". It is used in contradistinction to the expression "real owner". An ostensible owner is one, who has all the indicia of ownership without being the real owner. An ostensible owner is one who is not a real/ true owner, but exhibits himself to be so by possessing the qualities of ownership and possessing the property but never intended to own the property.

The general rule is, he, who conveys (transfers) property must have good title. It is based on the maxim 'Nemo dat quod non habet', which means "no one can convey a better title than what he himself has". However, this general rule is subject to certain exceptions. Transfer by ostensible owner is an exception to this

rule. Therefore, transfer by ostensible owner is valid, provided the conditions under Section 41 of the T.P.Act are satisfied. It is also known as 'the doctrine of holding out'.

Section 41, which deals with transfer by ostensible owner, reads as follows:

Where, with the consent, express or implied, of the person interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it; provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

The foundation of Section 41 is based on the judgment of Privy Council in –

Ram Coomer vs. Mac Queen (1872) 11 Bang. LR 52.

In the instant case, 'M' Purchased property but the sale deed was taken in favour of his Mistress 'B'. 'X' purchased the property from 'B', who was believed to be a real owner (ostensible owner). 'B' (real owner)'s heir (Plaintiff) claimed the property from 'X' (Purchaser)'s heir. It was held that the purchaser's title cannot be impeached on the ground of the doctrine of holding out. In this case 'B' is an ostensible owner, and 'B's transfer was held valid.

The Court observed – 'It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate and a third person purchases it, for value, from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser, by showing either that he had direct notice or something which amount to constructive notice of the real title, or that there existed circumstances, which ought to have put him upon an enquiry, that, if prosecuted, would have led to a discovery of it.'

Facts of the case in detail: One Alexander Macdonald who lived in Calcutta had a mistress known as Bunnoo Bibee. He had two children by her. One of them was the respondent, Macqueen. The property in dispute was purchased in the name of Bunnoo Bibee. The sale deed stood in her name. She received the rent from the tenants.

In June 1843, she sold the property to Ramdhone Koondoo (father of Ram Coomar) for Rs. 945. Subsequently, the purchaser created important buildings upon the land and increased the value to such extent that the property was valued to Rs.40000. After the death of Bunoo Bibee a suit was brought against Ram Dhone by Macqueen, claiming under the will of Alexander Macdonald. The claim put forward in the suit was that the purchase, although in the name of Bunoo Bibee was a purchase benami by Macdonald that he was the real purchaser, but had used her name in making the purchase.

The defence put forward by the defendant was that their father (Ram Dhone) purchased the estate of Bunnoo Bibee without any notice of the benami title.

The Calcutta High Court decided in favour of the respondent and decreed the suit. On appeal to the Privy Council, the judgment of the Calcutta High Court was reversed and suit dismissed.

Conditions: A transfer by ostensible owner to be effective (valid), the following conditions are to be satisfied under Section 41 of the Act.

(1) The transferor must be an ostensible owner.

(2) There must be consent express or implied from the real owner.

(3) He must transfer that property.

(4) The transfer must be for consideration.

(5) The transferee should have acted in good faith and has taken reasonable care that the transferor had power to transfer.

Illustrations:

1. A was the owner of a property, which was entered in the revenue records in the name of B to which A has objected. B mortgaged the property to C who accepted the mortgage relying on the revenue records. If C had made enquiry he would have found that A had objected to the entry of the property in B's name. C had not exercised reasonable care.

2. A assigned a lease of certain land to B, but he himself continued in possession. Land was not recorded in the name of B in the record of rights. A transferred a portion of the land to C by way of lease. C took the lease as he found not only the land recorded in the name of the transferor but also in his occupation. C has exercised reasonable care in purchasing the land and B's claim to land will not stand.

Burden of Proof: In sale/transfer by ostensible owner, the burden of proof lies on transferee. The transferee has to prove the following conditions to establish himself as a bonafide purchaser:

(1) The real owner allowed another person to act as owner of the property.

(2) He purchased the property for a valuable consideration and acted in good faith; and

(3) He made enquiries.

Who are not ostensible owners: The following persons have not been held to be the ostensible owners:

(1) a trustee in a trust;

(2) karta in a joint family;

(3) a guardian of a minor, a proposed agent or manager etc.

(4) a licensee in possession of property;

(5) a meniel servant in occupation of a property;

(6) a manager or trustee of an idol; and

(7) a donor, who has not reserved to himself any power of revocation of the deed of gift.

Transfer by Benamidar: A benamidar is an ostensible owner and if a person purchases from a benamidar, the real owner cannot recover unless he shows that the purchaser had actual or constructive notice of the real title.

A benami transaction is that where a person with funds supplied by himself, buys property in the name of another; there is a resulting trust in favour of the person who has supplied funds, the beneficial interest being in him, though the ostensible ownership is in the latter. Thus, the person who supplies funds for purchase of property is the real owner and the person in whose name property is acquired is a benamidar or an ostensible owner, e.g. if A purchases a house with his money in the name of his wife or his child, A will be the real owner and wife or child, as the case may be, will be a benamidar.

A transfer by a benamidar is covered by this section and the transferee will be protected provided he takes property in good faith after taking reasonable care to ascertain that the transferor had power to make the transfer. A benamidar is an ostensible owner within the meaning of this section.

Benami Transfers and Rights of Real Owner

In 1988 Benami Transaction (Prohibition) of the Right to Recover Property Act, 1988 (45 of 1988) was passed by the Parliament which replaces Ordinance No.2 of 1988. The Act has taken away the protection given by Section 41, Transfer of Property Act to the real owners.

Salient features of the Act

1. The Act has only four sections. It came into force on 19-5-1988 but the Act has retrospective operation and applies even to those cases where appeal is pending. The High Court should take note of the legislative change and decide the appeal according to law as it is at the time appeal is heard irrespective of what it was when trial Court heard and decided it.

2. The Act debars the real owner from claiming back the property on the basis of real title. It also disallows any defence to real owner on the basis of real title against the benamidar.

3. The Act provides 2 exceptions in which real owner can still claim the property on the basis of secret title–

   (i) Where the person in whose name property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family;

   (ii) Where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is trustee or towards whom he stands in such capacity.

4. Nothing in the Act shall affect provision of Section 53 of Transfer of Property Act or any law relating to transfer for illegal purposes.

5. The Act repeals (a) Section 82 of Trust Act; (b) Section 66 of Civil Procedure Code; and (c) 281-A of Income Tax Act.

The principle of Section 41 of Transfer of Property Act is not restricted to conveyances and applies also to mortgages. A mortgagee from an ostensible owner acting in good faith and with reasonable care has frequently been allowed the benefit of the section. In Jogendra's case there was a difference of opinion as to whether an ostensible mortgagee could be treated as an ostensible owner. It is submitted that he is the ostensible owner of the mortgagor's interest. If a purchaser for consideration of that interest, who had acted in good faith and with reasonable care, sought to enforce the mortgage, it seems clear that the mortgagor, who created that interest, would be estopped.

Applicability to minors: The section does not apply to minors. A guardian of a minor, who transfers his property, can be treated as an ostensible owner with consent of the minor.

Transfer by person having authority to revoke former transfer: Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power.

Illustration: A lets a house to B, and reserves power to revoke the lease if, in the opinion of a specified surveyor, B should make use of it detrimental to its value. Afterwards A, thinking that such a use has been made, lets the house to C. This operates as a revocation of B's lease subject to the opinion of the surveyor as to B's use of the house having been detrimental to its value.

2. DOCTRINE OF FEEDING THE GRANT BY ESTOPPEL [Section 43]

Section 43 of the Transfer of Property Act, 1882 deals with the Doctrine of Feeding the Grant by Estoppel. The principle laid down in Section 43, feeding the estoppel is partly based on the common law doctrine of estoppel by deed and partly based on the equitable doctrine, that equity regards that as done which ought to have been done.

Meaning: The expression 'Estoppel' is derived from the French word 'Estoup' which means, "shut the mouth". When a person tells us something, we generally hear him. If he says something different or contradicting, we would not hear any more and contradict such statement. Otherwise, we shall comply with it.

E.g.: A, intentionally and falsely tells B that, he is the owner of certain land and induces him (B) to purchase and pay for it. Later, A happens to become the owner of the said land. Then A

cannot set aside the sale on the ground that he did not have title at the time of the contract for sale. In other words, A cannot estop B for execution of the contract of sale.

When a person by declaration (act or omission) makes/induces another to believe a thing, cannot deny its truth subsequently. The other person cannot be estopped from proceeding upon such declaration. Estoppel is a rule of evidence, by which a person is not allowed to plead the contrary of a fact or state of things, which he has formally asserted as existing.

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

Illustration:

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

The object of the doctrine of estoppel is to protect the interest of a person who acted in good faith, believing the statement of another.

The common law doctrine, estoppel by deed means estoppel by agreement. When a person enters into an agreement, and his statement is furnished therein, he shall not be permitted to deny his statement. Where a person, through a deed transfers any property to which he has no title at that time and avers in the deed that he has title to it and subsequently acquires a title to it, his subsequent acquisition goes to the transferee and this process is known as feeding the estoppel.

The equitable doctrine involved in this principle provides that a man who has promised more than he can perform must make good his contract when he acquires the power of performance.

The English Law provides that 'where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee', or as it is usually expressed, 'feeds the estoppel'.

Section 43 deals with transfers by unauthorised person, who subsequently acquires interest in property transferred. It runs as follows:

Where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said opinion.

Illustration: A, a Hindu, who has separated from his father B, sells to C, three fields, X, Y and Z, representing that A is authorized to transfer the same. Of these fields, Z does not belong to A, it having been retained by B on the partition, but on B's dying, A as heir obtains Z. C, not having rescinded the contract of sale, may require A to deliver Z to him.

Essential conditions: The following conditions are essential for the applicability of this section.

(i) The transferor is an unauthorised person.

(ii) The transferor made a fraudulent or erroneous representation with respect to his right to transfer.

(iii) The transfer is for consideration.

(iv) The transferor subsequently acquired authority for the transfer

The Madhya Pradesh High Court has discussed the scope and applicability of the doctrine of feeding the grant by estoppel in *Johari vs. Mahila Droupati* (AIR 1991 MP 340). The Court has observed that Section 43 embodies the rule of estoppel and enacts that a person who makes a representation shall not be heard to allege the contrary as against a person who acts on that representation. The common Law rule of estoppel by deed known as 'feeding the estoppel' comes into play in as much as the subsequent estate passes to the transferee without any further act of the transferor.

Jhulan Prasad vs. Ram Raj Prasad, AIR1979 Pat. 54 – In this case, a Mohammadan woman sold property for herself and as guardian of her minor son. The sale was invalid as to the minors share. Subsequently the son died and his mother became the sole heir. It was held that the sale deed would operate upon the share of minor son as the buyer can invoke the doctrine of estoppel feeding the grant mentioned in Section 43.

Delhi Development Authority vs. Ravindra Mohan Aggarwal **(1999) 3 SCC 172** – In this case the appellant Delhi Development Authority made certain plots in Delhi and offered to the public. Ravindra Mohan Aggarwal was one of the participants in open auction, and succeeded for one plot. As per the terms of the appellant, he paid 25% of bid amount. Subsequently the appellant found that the area, in which it intended to sell the plots, was part of the green belt and not auctionable. It cancelled all the sales pertaining to that part. Aggarwal sued DDA invoking Section 43. The Delhi High Court gave judgment in favour of the purchaser and also gave instructions to the appellant to provide the purchaser with alternative plot of same size, in same locality and at same price.

The Supreme Court reversed the judgment of the High Court and opined that Section 43 could not be applied in this case.

Section 43 i.e., the Doctrine of Feeding the Grant by Estoppel is applicable only where transfer has already taken place.

Transfer of spes successionis – When a person transfers property representing that he has a present interest therein whereas he has, in fact, only a spes successionis, the transferee is entitled to the benefit of Section 43 if he has taken the transfer on the faith of that representation and for consideration. To hold that the transfers by the persons who have only a spes successionis at the date of the transfer, are not within the protection afforded by Section 43, would destroy its utility to a large extent.

Distinction between the Doctrine of Feeding the Grant by Estoppel (Section 43) and Spes Successionis (Section 6(a):

Doctrine of Feeding the Grant by Estoppel (Section 43)	Spes Successionis (Section 6(a)
1. The transferor represents himself as owner of the property. It amounts to fraudulent transfer.	1. The transferor represents himself as the only legal heir entitled to succeed the property. It does not amount to fraudulent transfer.
2. The transfer becomes valid.	2. The transfer is void.
3. Section 43 enacts a rule of estoppel.	3. Section 6 (a) enacts a rule of substantive law.

Transfer by one co-owner (Section 44): Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the

conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

Joint transfer for consideration (Section 45): Where immovable property is transferred for consideration to two or more persons, and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property.

Transfer for consideration by persons having distinct interests (Section 46): Where immovable property is transferred for consideration by persons having distinct interests therein, the transferors are, in the absence of a contract to the contrary, entitled to share in the consideration equally, where their interests in the property were of equal value, and, where such interests were of unequal value, proportionately to the value of their respective interests.

Illustrations:

(1) A, owning a moiety, and B and C, each a quarter share, of mauza Sultanpur, exchange an eighth share of that mauza for a quarter share of mauza Lalpura. There being no agreement to the

contrary, A is entitled to an eighth share in Lalpura, and B and C each to a sixteenth share in that mauza.

(2) A, being entitled to a life-interest in mauza Atrali and B and C to the reversion, sell the mauza for Rs.1000. A's life-interest is ascertained to be worth Rs.600, the reversion Rs.400. A is entitled to receive Rs.600, out of the purchase-money, B and C to receive Rs.400.

Transfer by co-owners of share in common property (Section 47): Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration: A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer, one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

3. PRIORITY OF RIGHTS
[Section 48]

Section 48 of the Transfer of Property Act deals with priority of rights (related by transfer). Section 48 is based on the English equitable maxim 'qui prior est tempore, potiorest jure', which means "he, who is first in point of time has a better claim in law". This is a principle of natural justice that if rights are created in favour of two persons over the same property at two different times, the one that has been created first shall have advantage in law. Section 48 runs as follows:

Where a person purports to create by transfer at different times rights in or over the same immovable property, and such

rights cannot at all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

E.g.: A mortgages property X to B and then mortgages the same to C and again mortgages the same X to D. Now property is not sufficient to meet the debts of B, C and D under Section 48, B will get priority over C and D; and C can also get the priority over D.

If two mortgages executed on the same date, priority would be given on the basis of evidence, which is firstly, executed.

Exceptions: Many exceptions have been recognised to this rule, viz.–

(1) Section 78 of this Act provides that where through the fraud, misrepresentation or gross negligence of prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

(2) Section 50 of the Registration Act gives a subsequent registered deed priority over a prior unregistered deed of which registration is optional. This exception, however, is subject to the doctrine of notice.

(3) In a suit for partition, if a receiver, under the direction of the Government mortgages the whole or part of the estate, the mortgagee would be entitled to priority over an execution creditor by whom the property was attached after the commencement of the suit for partition.

(4) A lien of a co-sharer for owlety money on partition is entitled to precedence over prior mortgagees of property allotted to the co-sharer who is liable to pay owlety.

(5) Under Section 98 of the Bengal Tenancy Act, 1885, a previous mortgage by a co-owner of his share was subject to a subsequent charge created by a manager over the whole estate.

Transferee's right under policy (Section 49): Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property.

Rent bona fide paid to holder under defective title (Section 50): No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

Illustration: A lets a field to B at a rent of Rs.50, and then transfers the field to C. B, having no notice of the transfer, in good faith pays the rent to A. B is not chargeable with the rent so paid.

4. IMPROVEMENTS MADE BY BONA FIDE HOLDER UNDER DEFECTIVE TITLES [Section 51]

Section 51 of the Transfer of Property Act speaks about improvements made by bonafide holders under defective titles. It runs as follows:

When the transferee of immovable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement.

The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

Section 51 is based on the principle of equitable maxim 'He, who seeks equity, must do equity'. The main object of Section 51 is to protect the interest of the bonafide purchaser.

When the transferee makes any improvements of immovable property, in good faith that he is absolutely entitled and he is subsequently evicted by any person having better title, the transferee has a right to require the evictor, either to have the value of the improvements estimated or paid to him or to sell the property to him as if there were no improvements. The value of improvements must be the value at the time of eviction.

Illustration: A purchased the property of a Mohammedan minor from his mother who was acting as a de facto guardian, believing in good faith that she had authority to sell. When A was evicted by the minor the minor was entitled to compensation for improvements that he had made.

Conditions: For applicability of Section 51, the following conditions are to be fulfilled.

(1) The person claiming compensation should be a 'transferee'. So a trespasser is not entitled to the benefit of the section.

(2) He should have believed in good faith that he was absolutely entitled to the property.

(3) He should have made an improvement.

(4) The owner of the property has an option under Section 51 either to sell his interest in the property or pay compensation for the improvement.

Bhatt vs. Bhatt **(AIR 1987 SC 1348)** – In this case the transferees were found to have been in possession of the properties ever since 1934 and to have been enjoying the income therefrom. They had effected improvements to the property. The Supreme Court felt that the transferees should not be left without any compensation for the improvements effected. Accordingly, on an equitable basis, the Supreme Court directed the plaintiffs to pay the transferees a sum of Rs.30000/- in addition to the amount decreed. On such payment, the transferees were ordered to deliver the properties to the plaintiffs.

Narayana Rao vs. Basavarayappa **(AIR 1956 SC 727)** – In this case Basavarayappa purchased certain land from a person having good faith and after verification of the title deeds. He registered the said land in his favour. After some years he constructed a building in it. Narayanarao was the real owner of the property. He sued Basavarayappa for eviction and proved his original title on the land. The Court ordered for the eviction of Basavarayappa. The Court gave an option to Narayana Rao to pay to the defendant the cost of improvements and take possession or to sell the land to the defendant. On 25-7-1945, Narayana Rao the plaintiff elected to pay building. The valuer assessed the value at Rs.14000/-. The plaintiff actually took the possession of the land and house on 1-7-1948. The defendant raised the question that the valuation was made on 25-7-1945, but the property was taken in possession on 1-7-1948, i.e. three years later. He prayed for revaluation of the building as in 1948.

The Supreme Court gave judgment in favour of the defendant, and gave the order for revaluation.

As per the order of the Supreme Court, revaluation was made and it came to Rs.19000/-. The plaintiff paid Rs.19000/- to the defendant.

5. DOCTRINE OF *LIS PENDENS* [Section 52]

Section 52 of the Transfer of Property Act, 1882 deals with 'the Doctrine of Lis Pendens'. Section 52 relates to Transfer of Property pending suit relating thereto. It runs as follows:

During the pendency in any Court having authority within the limits of India excluding, the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation: For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

Amendment: Section 52 has been amended by Section 14 of the Transfer of Property (Amendment) Act 20 of 1929. The word pendency has been substituted for the words 'active prosecution' which gave rise to a great conflict of decisions. The words 'any suit or proceedings which is not collusive' have been substituted for the words 'a contentious suit or proceeding' which also led to conflicting decisions on the question as to when a suit or proceeding became contentious. To remove this latter conflict, an explanation is also added fixing the time during which a suit is deemed to be pending for the purposes of the section.

Meaning: The expression 'Lis' means "litigation" (or an action or a suit). 'Pendens' means "pending" (continuing). Lis pendens collectively means 'pending suit or an action'.

According to the doctrine, 'where a suit is pending before the competent court, in which any right to property is (directly or indirectly or specifically) in question, the property cannot be transferred or dealt with by any party to the suit except under the authority by Court or such terms as it may impose'.

In simple words, when title of property is in question before a court of competent jurisdiction, such property should not be transferred by way of sale or gift or lease or mortgage. If transferred, such transfer is invalid and the transferee has no claim.

Examples:

(1) 'A' says that he is the owner of property 'X'. 'B' also claims to be the owner of the same property 'X' and sued 'A'. When the matter (i.e. dispute as to title of the property) is pending before the Court, 'A' cannot transfer the property by sale or gift etc. If so such transfer is not valid.

(2) A has some property. He mortgaged that property to B in 1997. B filed a case against A in the competent court for the recovery of the money in March 1999. During the pendency of the case, A sold the said property to C. The sale transaction between A and C has been prohibited under the 'Doctrine of Lis Pendens', as it affects B's right.

(3) X has a house. He enters into a contract to sell the house to Y for one lakh, and receive ten thousand rupees as an advance. Within the stipulated date X does not come forward to register it. Y files a case against X for specific performance of the contract. While the case is pending before the Court, X sells the house to Z and registers it in favour of Z. X's subsequent sale transaction is void as it is lis pendens.

Bellamy vs. Sabine (1857) 1 De C & J. 5661 – In this case, 'F' being a heir sued 'E' for selling an estate to 'S'. During pendency of the suit 'S' transferred it to 'B', who had notice (knowledge) of the suit. The court through Turner, L.J. held in favour of 'F'. Turner, L.J. observed–

'When a litigation is pending between a plaintiff and a defendant as to the rights to the particular estate, the necessity of mankind requires, that the decision of the Court shall be binding not only on the litigant parties, but also on those who derive title under them by alienation made pending the suit.'

The doctrine of lis pendens has been fully expounded by the Privy Council in *Faiyaz Hussain Khan vs. Prag Narain* (1907) 29 All 399 P.C. where their Lordships quote with approval the observations of Lord Justice Turner in Bellamy's case. The effect of the application of the doctrine is that it does not annul the conveyance, but only renders it subservient to the rights of the parties to the litigation.

Supreme Court in ***Jayaram Mudaliar vs. Ayyaswami and others*, AIR 1973 S.C. 569,** has held – 'The purpose of Section 52 of the T.P.Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claim are put forward'.

Underlying Principle: The Doctrine of Lis-pendens is based on the Common Law maxim *'Pendente lite nihil innovator'*, which means, "during pendency of a litigation nothing new should be introduced". It is based upon public policy and holds good though it creates hardship to an innocent purchaser.

Section 52 when analysed shows that it is in two parts. The first part lays down the conditions for the applicability of the doctrine and the second part lays down what are the consequences if the doctrine applies.

Essential Conditions of the Doctrine: For application of the doctrine, the following conditions are to be satisfied.

(1) There must be pendency of a suit or pendency of a proceeding.

(2) The pendency of suit must be in the court of competent jurisdiction (Competent Court).

(3) The suit or proceeding should not be collusive.

(4) A right to immovable property should be (directly or indirectly or specifically) in question in the suit. (The question involved in the suit must be a right to immovable property).

(5) The transfer should be made by one of the parties to the litigation without authority of the court.

(6) The alienation must affect the right of the other party.

1. Pendency of a suit: The pendency of suit commences from the date of filing of plaint, and continues till the disposal of the suit by a decree or an order. Appeals and execution proceedings come within the purview of continuation of the proceedings. If the plaint is filed in High Court and is returned for presentation in Lower Court competent to try, the pendency commences from the date of filing in the High Court. If the suit is first filed in lower court and from there, if it is returned for presentation in High Court, then the pendency commences from the date of presentation in the High Court.

There was a conflict of opinion as to the question, 'whether the pendency commences from the date of filing a suit or date of serving the summons. The Privy Council settled this question in–

Prag Narayan vs. Priyaz Hassan Khan, 29 All. 339: That the pendency of a suit commences from the date of filing of the plaint and not from the date of serving of summons.

In the case of *Hari Lal vs. Balwantia and others,* AIR 1998 Alld. 211 – it was held that if the plaintiff was entitled to get maintenance in the life time of his husband and could pray for

charge against the property of his husband, later this right of the wife would not be affected by the sale deed executed during the pendency of the suit on the transfer of such property to the defendants and the sale deed would be hit by virtue of Section 52 of the Transfer of Property Act.

2. Competent Court: Section 52 applies if the suit is pending before the Court of competent jurisdiction.

3. Must not be collusive: The doctrine (Section 52) is not applicable if the suit is collusive. A collusive suit is not real and it is a preplanned one to defeat the defendants.

4. Immovable Property: The issue or question involved in the suit must be a right with regard to an immovable property.

5. Actual transfer: For application of the doctrine, there must exist actual transfer which includes sale, gift, mortgage, lease etc.

6. Affecting another's right: For application of the doctrine, the transfer should affect the right of another person. The transfer during pendency is not *ipso facto* void, but voidable. The doctrine is not applicable if the rights of the transferor alone are affected and not the rights of parties to the suit.

Applicability of Lis Pendens: It applies to those transfers which are made during pendency of suit or appeal arising out of that suit. Such transfers are liable to be declared void and invalid.

Doctrine in India: The leading case on this doctrine in India is *Faiyaz Hussain Khan vs. Prag Narian* (29 All 339), in which the Privy Council quoted with approval the observation of Turner, LJ., and *Lord Cranworth in Bellamy's* case, and many other cases in this country involving the question of *lis pendens* have been decided on the same principle. The rule, it will be obvious, is not based on the doctrine of notice but on expediency, i.e. the necessity for final adjudication.

In *National Textile Corporation (U.P) Ltd., Kanpur vs. Swadeshi Cotton Mills Co. Ltd. and others* (2000(1) A.W.C. 2.11(Noc), it was held that Section 52 enacts the doctrine of *lis pendens*. It imposes a prohibition on transfer or otherwise dealing with any property during the pendency of a suit, provided, the conditions laid down in the section are satisfied.

Suit filed on the same day on which deed registered: Effect – In **Narayana Pillai Chandrasekharan Nair vs. Kunju Amma Thankamma (AIR 1990 Ker 177 at pp.178, 179)** the contention that sale deed is hit by the rule of *lis pendens* embodied in Section 52 of the Transfer of Property Act does not appear to be correct. It is true that execution and registration of sale deed and the presentation of the plaint were on the same day. So also, sale deed shows that it was registered only at 2.30 p.m. That does not mean that execution and presentation for registration were at that time. It must have been executed and presented for registration much earlier. Then only after the formalities and in the usual course it could have come up before the Sub Registrar at 2.30 p.m. There is no evidence regarding time at which sale deed was executed. That is when there is no evidence regarding the exact time. But the presentation of the plaint or the institution of the proceeding in a Court which alone is the commencement of the pendency of a suit or proceeding for the purpose of Section 52 under the explanation, is not a judicial proceeding which is capable of resisting the above presumption. Appellant was not able to say when the plaint was presented. That means that even though both were on the same day he was not able to discharge his burden to prove that the transfer or otherwise dealing with property under sale deed by the respondent was after the commencement of the *lis*. If so, sale deed must be taken as not affected by Section 52, T.P.Act. Especially when the pronote became barred by limitation and the appellant had not deposited the amount of Rs.5000/-, sale deed could not be challenged otherwise also.

'Transferred or otherwise dealt with' the property appearing in Section 52, T.P.Act is not the admission of execution before the

Sub Registrar or the registration by him. That is execution and transfer of possession and title as the case may be. The burden is on the party relying on the effect of Section 52 and pleading *lis pendens* to prove that his suit was instituted before the execution of the deed of transfer, which he is impeaching.

As observed by Grove, J. in *Campbell vs. Strangeways* (1877) 3 CPD 105, quoted in AIR 1990 Ker 177at pp.179, 180, law will distinguish the fractions of a day where it is necessary not merely for the purpose of justice, which is a vague term, but also for the purpose of the decision to show which of the two events in question first happened. Judicial proceedings are to be considered as taking place at the earliest period of the day on which they are done.

Exceptions: The Doctrine of Lis Pendens is not applicable in the following cases.

(1) Where transfer takes place with the consent of the Court.

(2) Where the transfer relates to money disputes.

(3) Where the transfer is for revenue sales.

***Res judicata* and *Lis Pendens*:** The rule of Resjudicata prevents the owner from dealing *Lis Pendens* and once a judgment is pronounced by a competent court in regard to the subject matter of the suit in which the doctrine of *Lis Pendens* applies, the decision is resjudicata and binds not only party to the suit but also the transferee *Pendente Lite.*

***Lis pendens* and the Doctrine of notice:** The rule contained in Section 52 of the Transfer of Property Act is, however, not based on the doctrine of notice but on expediency. The lis pendens rule does not annul the transfer but only renders it subservient to the rights of the parties to the litigation. According to this rule, therefore, whosoever purchases a property during the pendency of a suit is bound by the judgment that may be made against the person from whom he derived title even though such a purchaser was not a party to the action or had no notice of the pending litigation.

6. FRAUDULENT TRANSFER [Section 53]

Section 53 of the Transfer of property Act, 1882 lays down the provisions relating to Fraudulent Transfers. Section 53 as amended by the Amending Act of 1929 runs as follows:

1. Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

2. Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purpose of this sub section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Analysis: The following ingredients are inferred when Sub Section (1) of this section is analysed:

(1) Transfer of an immovable property;

(2) Transfer must be made with intent to defeat or delay the creditors of the transferor;

(3) Transfer shall be voidable at the option of any creditor defeated or delayed.

Exceptions:

(1) The Rights of a transferee in good faith and for consideration are unaffected.

(2) Any right created by the law of insolvency remains unaffected.

The expression 'fraudulent transfer' denotes, "dishonest transfer" or transfer with intent to defeat the interest of the transferee/creditor. Where a person transfers his property so that his creditors shall not have anything out of the property, the transfer is called a fraudulent transfer. A debtor, in order to defeat or delay the rights of a creditor, may transfer his property to some person, who may be his friend or a relative. Section 53 does not allow such transfer.

A transfer/debtor may transfer his property with an intention to defraud (delay or defeat) the transferee/creditor. Further/ Subsequent transfer may be made without consideration with an intention to defraud the subsequent transferee. In such cases, the creditors/transferees are protected under Section 53 of the T.P. Act.

This section consists of two parts. The first part lays down that every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. To take one illustration, A, who is heavily indebted, and against whom a suit for the recovery of debts is going to be filed, sells his house to B to save it from being attached and sold in payment of the debt. If B knows of A's fraudulent intention, the sale to B is liable to be set aside at the option of the creditors. It will be seen that the rights of a transferee in good faith and for consideration are not affected even though the transfer is made with intent to defeat the creditors.

The second part of the section lays down that every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee, but that no presumption to defraud shall necessarily arise by reason only that a subsequent transfer for consideration was made.

A transfer to defeat or delay the creditors is not ipso facto void, but voidable at the instances of those who are thus defeated, delayed or defrauded.

In *Saroj Ammal vs. Venkateswara Finance Corporation,* AIR 1989 NOC 4 Mad. Madras High Court held that the essential ingredient for invalidating a transfer under Section 5 of the Act is a fraudulent intention to defeat or delay the conditions, the Court also observed that the transferee must share the fraudulent intent and must actively aid and assist the transferor in carrying out this intention.

Creditor: The word 'creditor' has been used in this section in somewhat wide sense. Thus, it includes all those who are creditors on the date of transfer as well as those who become creditors subsequent to the date of fraudulent transfer. Further, it includes not only those creditors who have obtained decrees, but also those whose claims have yet to be proved in a Court. On the other hand, a person who claims an unliquidated sum for damages for tort or breach of contract is not a creditor, nor a person whose claim for a debt has become time barred.

Intent to defeat or delay: The intention must be to defeat or delay the creditors. Such intention can be proved by circumstantial evidence. The evidence required to substantiate fraud must necessarily vary according to the circumstances of each case. The mere fact that a transfer is made without consideration will not necessarily lead to an inference that the transfer was made with the intention of defrauding the creditor. The following factors may be relevant to a conclusion that the transaction is not bona fide–

(i) the debtor sells all his property keeping nothing to himself;

(ii) the consideration is grossly inadequate;

(iii) the transfer is made secretly and in haste;

(iv) the transferor puts all his property out of the reach of those who might become his creditors before embarking on some hazardous enterprise.

The scope of Section 53 was critically analysed by the Privy Council in *Musahar Sahu vs. Hakimlal* (43 Cal. 521 PC) Musahar Sahu, the creditor in the instant case sued the debtor Kishun Benode for the recovery of his debt in Dec. 1900. In Jan. 1901, during the pendency of the suit, the creditor applied for attachment of certain properties of the debtor before judgment. In Feb. 1901, the debtor filed an affidavit that he had no intention of transferring his properties and the application of the creditor was dismissed. In spite of that in Sept. 1901 he sold the properties to another creditor, Hakimlal. It was held that although the sale defeated Musahar Sahu, the first creditor, but as it was for adequate consideration and in satisfaction of a genuine debt and as the debtor reserved no benefit for himself it was a case of one creditor being preferred to the detriment of another and it is not affected by this section.

This view was repealed by the Privy Council in *Meena Kumari vs. Bijoy Singh* (44 IA 72 (P.C) (1916-17), in which it was observed: "A debtor, for all that is contained in Section 53 of the Transfer of Property Act, may pay his debts in any order he pleases and prefer any creditor he chooses." The Privy Council followed an English decision *Meddleton vs. Pollock,* 1876-2 Ch. D. 104 in Musahar Sahu and Meena Kumari's Cases.

Who can invoke benefit under Section 53: Creditors against whose interest the transfer is made can invoke the benefit in this Section. It includes those who become creditors at the date of transfer as well as those who are creditors subsequent to the date of fraudulent transfer. Creditors here again include to whom a liquidated or definite sum is due and also future creditors *Hackay vs. Douglas.*

Where the prior transfer is not voluntary, but is for consideration, howsoever small, the transfer would not be voidable at the option of subsequent transferee.

Illustrations:

(1) A creditor obtained a decree against a widow who had a life interest in the property left to her by her husband. The widow with the object to render the property out of reach of the creditor surrendered her interest to her son. It was held that the surrender was voidable at the option of the creditor under this section.

(2) A being in embarrassed circumstances wished to convert his property into cash so as to conceal it from his creditors. B being aware of A's object assisted him by purchasing the property. The sale was voidable under this section.

(3) A partnership firm, situated at Visakhapatnam was in an embarrassing circumstances. It had incurred a debt to the tune of Rs.2 lakhs. In those circumstances the vendor decided to sell his share of immovable property in the firm. The sale deed was registered at Madras instead of Visakhapatnam, where the property was situated. Both the transferor and the transferee belonged to same community and they were in a position to know each other. It was held by the Supreme Court that Section 53 applied, and the transfer was intended to defeat or delay the creditors. The facts and circumstances of the case threw sufficient light on the intention of the transferor and the transferee.

(4) A, the owner of a property, sold the same to his father-in-law B for a small sum of money. The consideration being payment of mortgage debt which had not become due and there was no legal necessity to transfer the property. The transferor even after the sale continued in possession of the property and he made certain payments in satisfaction of mortgage debt. It was held that the transferor had prima facie intention to defeat or delay his creditors, and the transfer was not made in good faith or for consideration.

7. DOCTRINE OF PART-PERFORMANCE [Section 53-A]

Section 53.A of the Transfer of Property Act, 1882 speaks about the Doctrine of Part Performance. This Section (53.A) was inserted by Section 16 of the Amendment Act 20 of 1929. It runs as follows:

Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty.

And the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract.

And the transferee has performed or is willing to perform his part of the contract.

Then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract of the part performance thereof.

Law imposes certain formalities for validity of certain contracts. It requires registration for transfer of an immovable property if the value is above Rs.100/-. Strict compliance to such

legal formalities sometimes may lead to great hardship. For instance, in a contract, both the parties have to fulfil their contractual obligations. One party had already performed his obligation with a confidence that the other party would perform his part. But, the other party may refuse to perform his part taking the advantage that the document is not registered. In such cases, the doctrine of part performance is applicable, though there is no registered document.

Section 53.A of the T.P.Act, which deals with the 'doctrine of part performance', is an exception to the general rule that "every transfer of property is to be registered, if required under law". In England, Section 4 of the Statute of Fraud, it is provided that no action or suit shall be maintained on an agreement relating to land, which is not in writing signed by the party to be charged with. The doctrine of part performance is based on the principle of equity that the statute cannot be allowed to be made on instrument of fraud.

According to this doctrine, where a person has taken possession of immovable property on the basis of a contract of sale and he has either performed or is willing to perform his part of contract, then he would not be ejected from the property on the ground that sale was unregistered and legal title has not been transferred to him.

Example: (1) 'A' agrees to sell his property to 'B' and 'B' has taken possession of the same. Later, 'B' cannot refuse to perform (enforce) the contract taking the advantage that the agreement is not registered.

(2) A has a house. A contracted with B to sell his house. B paid some amount as an advance towards the price of the house. Meanwhile, A handed over the possession of the house to B. While B was ready to pay the balance amount, A refused to take that amount, moreover demanded B to vacate the house, and to cancel the contract. B is ready to perform his part. But A is not ready to perform his part. Then B can bring a suit for the specific performance of the contract against A. A cannot take the plea that the sale of

the house is not registered. This is called the 'Doctrine of Part Performance'. It is born from English Law of Equity.

Object: The main object of the doctrine of part performance under Section 53.A of the T.P.Act is to protect the interests of an ignorant/innocent purchaser/transferee, who takes possession or spends money in improvements relying on documents, which are ineffective as transfers or on contract, which cannot be proved for want of registration.

Essential Elements: The doctrine, to be applied, the following conditions are to be satisfied:

(1) there must be a contract to transfer an immovable property for consideration;

(2) the contract must be in writing signed by or on behalf of the transferor;

(3) the contract must be such that from it the terms of transfer can be ascertained with reasonable certainty;

(4) the transferee must in pursuance of the contract have taken possession of the subject matter of transfer or if he is already in possession, continues in possession;

(5) the transferee must have done some act in furtherance of the contract; and

(6) he has performed or willing to perform his part of the contract.

The doctrine of part performance was developed on the basis of the decisions in the following cases:

Walsh vs. Lansdalel, 11882, 21 Ch.D 9 — In the instant case, 'L' and 'W' entered into lease agreement for 7 years. The rent was to be payable quarterly. An advance of one-year rent also was to be paid if demanded. 'W' took possession by paying the quarterly rent without executing lease deed. Later, 'L' demanded advance (of one year rent). On default 'L' seized 'W's goods. 'W's suit

for damages was dismissed by House of Lords. The Court held that the agreement of lease could be treated as lease itself.

The rule laid down in Walsh vs. Lansdale is not applicable in India as it did not constitute the doctrine of part performance.

Maddison vs. Alderson (1883) 3 App. Cas 467 (475, 476) – Alderson entered into an agreement with 'B' to render some service. 'B' should give his life estate to Alderson as consideration. The validity of the will was questioned for want of attestation. 'B's heir sued on the ground that the will was not valid. The House of Lords held that the 'Doctrine of part performance' was not applicable since 'A's service was not in connection with the transfer of property.

Position in India: The doctrine of part performance so developed in England was not incorporated originally in the Transfer of Property Act, 1882. It was inserted in this Act by the Amendment Act of 1929. Before the enactment of the Transfer of Property Act 1882, the English doctrine of part performance was applied in India. At that time, two different lines of arguments were taken up. According to some High Courts, the English doctrine of part performance did not apply in India, because Section 54 of the Act requires a sale of an immovable property worth Rs.100/- or more, to be completed by registered instrument.

Similarly, Section 59 requires that where the principal money secured is Rs.100 or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Section 107 dealing with leases, says that 'a lease of immovable property from year to year or for any term exceeding one year or reserving yearly rent can be made only by a registered instrument.' Some High Courts, on the other hand, were of the view that the doctrine was applicable in India. When this controversy was raised before the Privy Council in *Mohd. Musa vs. Aghor Kumar Ganguli* (AIR (1914) P.C. 27 (30), it held that the doctrine of part

performance is applicable in India. But in two subsequent cases, the Privy Council deviated from its stand in Moh. Musa's case and held that the doctrine did not apply in India. In *Ariff. Jadunath* (1931) 5 I.A. 98, it was held that the doctrine could not be applied in India so as to override the imperative provisions of the Transfer of Property Act and the Registration Act. This view was again reiterated in *Mian Pir Bux vs. Sardar Mohd. Tahir,* (1934) 61 I.A. 388. It was held that the claimant should seek his remedy consistently with and not in violation of the statute. However, the Transfer of Property Act, 1882 was amended in 1929 and the English doctrine of part performance, in its modified form, was introduced in the Act, in the form of Section 53.A. It is to be noted, however, that *Ariff vs. Judunath and Mian Pir Bux vs. Mohd. Tahir* were decided after the enactment of Section 53.A but they dealt with the law as it stood before 1929.

Distinction between English Law and Indian Law

The doctrine of part performance is applied in England and India. Following are the notable points of distinction in its application.

English Law	Indian Law
1. Section 40 of the Law of Property, 1925 deals with the doctrine in England.	1. Section 53.A, which is inserted to the T.P.Act, 1882 (by the Amendment Act of 1929) deals with the doctrine.
2. To invoke protection under the doctrine, the contract need not be written and signed by the Transferor.	2. The contract must be in writing and signed by the transferor.
3. The right under the doctrine is equitable right.	3. The right under the doctrine is statutory right.

English Law	Indian Law
4. Under the English law, the Doctrine of Part Performance can be used both as shield as well as sword. It can be used both for enforcing the right as well as for defending the right.	4. Section 53.A can be availed only as a shield and not as a sword i.e., it can be used only for defending the possession of the transferee.
5. It creates a title in the transferee.	5. It does not create a title in the transferee.

PART – II

SPECIFIC TRANSFERS

[Sections 54-137]

This part of the book deals with 'Specific Transfers'. Chapters III to VIII of the Transfer of Property Act, 1882 containing Sections 54 to 137 lay down the provisions relating to Specific Transfers.

Chapter III containing Sections 54 to 57 deals with 'Sale of Immovable Property'. Chapter IV containing Sections 58 to 104 deals with 'Mortgages of Immovable Property and Charges'. Chapter V containing Sections 105 to 117 deals with 'Leases of Immovable Property'. Chapter VI containing Sections 118 to 121 deals with 'Exchanges'. Chapter VII containing Sections 122 to 129 deals with 'Gifts'. Finally Chapter VIII containing sections 130 to 137 deals with 'Transfer of Actionable Claims'.

LECTURE XI

SALE OF IMMOVABLE PROPERTY

[Chapter II : Sections 54 – 57]

Chapter II, containing Sections 54 to 57 of the Transfer of Property Act, 1882 lay down the provisions relating to 'Sale of Immovable Property'. Section 54 defines Sale. Section 55 deals with Rights and Liabilities of buyer and seller. Section 56 provides for Marshalling by subsequent purchaser and Section 57 makes provision for Discharge of Encumbrances on sale. This lecture covers–

(1) Sale : Meaning, Definition and Elements.

(2) Sale and Agreement to sell; and

(3) Rights and Liabilities of Buyer and Seller (Section 55)

  (a) Rule of Caveat Emptor

  (b) Vendor's Lien.

1. SALE : MEANING, DEFINITION AND ELEMENTS

Meaning: The word 'Sale' literally means "voluntary transfer of property from one person to another for a price."

Sale is a transfer of absolute interest in property, movable or immovable property from one person to another in consideration for price, paid or promised; or partly paid and partly promised. Sale under Section 54 of the T.P.Act refers to sale of immovable property only.

Section 54 of the T.P.Act defines – "Sale is a transfer of ownership in exchange for a price paid or promised or part paid and part promised". It runs as follows:

Sale how made: Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer or such person as he directs, in possession of the property.

Contract for sale: A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

In sale, the person who conveys the property for a price or consideration is known as the seller or vendor and the person, who acquires it is known as the buyer or purchaser. In other words, the person transferring (transferor) the property is called 'Seller' or 'Vendor' and the person to whom it is transferred (transferee) is

called 'Buyer' or 'Purchaser'. The contract between the Seller and Buyer is called 'Contract of Sale'.

Essential Elements: To constitute sale, the following conditions are to be satisfied.

1. Parties.
2. Subject Matter.
3. Transfer or Conveyance; and
4. Consideration or Price.

1. Parties: In a contract of Sale, there are two parties namely – Seller/Vendor and Buyer/Purchaser.

Both the Seller and Buyer must be competent to contract under Section 11 of the Indian Contract Act, 1872. (Major, sound mind and not disqualified by the law in force). The Seller must be competent to transfer i.e. either he must have title or authority over the property to transfer (Section 7, T.P.Act). The buyer must be competent to be a transferee and should not be disqualified to be a transferee (Section – 6). A person is a judge, a legal practitioner or an officer connected with a court of law is forbidden from purchasing an actionable claim under Section 136 of the T.P.Act. Similarly, Order 21, Rule 73 prohibits any officer or person having any duty to perform in connection with any sale from acquiring an interest in the sale property. A minor is not incompetent to become a buyer. A sale of property in favour of a minor is valid.

2. Subject Matter: The subject matter must be a transferable immovable property (Section 7). It may be tangible (E.g.: Land, buildings, etc.) or intangible such as right of ferries, fisheries, a mortgage debt, a patta right etc.

3. Transfer or Conveyance: There must exist transfer or conveyance of ownership i.e. transportation of absolute interest in the property by the seller in favour of the purchaser in a manner

prescribed by law. The transfer must be in exchange for a price. The price may be paid or promised, or partly paid or partly promised.

4. Consideration or Price: The transfer of ownership in exchange for a price is the essence of a sale. The word price is used in its ordinary sense as money only.

Mode of Sale: According to Section 54, there are two modes of Transfer for sale as follows:

(i) By Registered Instrument; and

(ii) By Delivery of Possession.

Registered Instrument: Whether it is a tangible immovable property or intangible immovable property, if the value is Rs.100 or above, the transfer must be effected through a registered instrument. If the value is below Rs.100/- the transfer may be effected either by registered instrument or by delivery of possession of property.

2. CONTRACT FOR SALE OR AGREEMENT TO SELL

Contract for Sale (Section 54): A contract for the sale of immovable property is a contract that the sale of such property shall take place on the terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

Essentials of Contract for Sale: To constitute contract for sale the following conditions are to be satisfied:

(i) There is an agreement between the parties.

(ii) The agreement as to future sale.

(iii) It does not create any interest in the property.

(iv) It does not create any charge on the property.

(v) There must be a consideration in the form of price to be paid.

Distinction between Sale and Agreement for Sale

Sale	Contract for Sale (Agreement to Sell)
1. It (sale of immovable property) is a transfer of ownership.	1. It is an agreement that sale is to take place in future.
2. The ownership is vested in the purchaser/buyer.	2. Ownership remains with Seller/Vender. But in England, Buyer becomes equity owner and acquires interest in the property.
3. It is an executed contract.	3. It is an executory contract.
4. It passes (confers) absolute title to the purchaser.	4. It does not convey any title to the purchaser.

3. RIGHTS AND LIABILITIES OF THE SELLER AND THE BUYER [Section – 55]

Section 55 of the T.P.Act deals with the rights and liabilities (duties) of the Seller and the Buyer. Generally these rights and liabilities are correlative i.e. the rights of the seller are the duties of the purchaser. Similarly the rights of purchaser are the duties of the seller. The rights and liabilities of the seller and buyer may be explained with reference to:

(A) Before completion of Sale; and

(B) After completion of Sale.

The former are contractual, while the latter are regulated by the rule that property having been passed to the buyer, the transaction cannot be avoided.

(A) BEFORE COMPLETION OF SALE

Seller's Liabilities (Section 55(1)	Buyer's Liabilities (Section 55(5)
1. He has to disclose material defects of the property.	1. He has to reveal (disclose) the facts that materially increase the value of the property.
2. He should produce title deeds.	2. He should pay price.
3. He has a duty to answer questions as to the title of the property.	3. —

Seller's Rights (Section 55(4)	Buyer's Rights (Section 55(6)
1. He has a right to take all rents and profits.	1. He has a right of lien over the property for the price paid.

(B) AFTER COMPLETION OF SALE

Seller's Liabilities (Section 55)	Buyer's Liabilities (Section 55(5)
1. He has to give possession and to deliver title deeds on receipt of price (Section 55(1)(F) and Section 55(3).	1. He has to bear losses and to pay outgoings.

Seller's Rights (Section 55(4)	Buyer's Rights (Section 55(6)
1. He has a lien over the property if price is not paid (Vendor's lien).	1. He has a right to get increase (increment) in value, rent and profits.

The above points may be explained in detail as follows:

Seller's Liabilities before completion of Sale:

1. To disclose material defects: Seller has a duty to disclose known material defects of the property to the Buyer. Omission to disclose such defects amounts to fraud. The rule of Caveat Emptor is applicable here.

Rule of Caveat Emptor: It is a fundamental rule relating to sale in English Common Law. It means 'let the buyer beware'. Once sale is completed, the seller has no outstanding liability towards the buyer. In T.P.Act, certain qualifications are prescribed for this maxim and hence, it is applicable to certain extent only.

In sale of Immovable Property, the maxim has a limited application and it extends to patent defects (i.e. defects, which can be easily observable/visible; whereas latent defects are those which cannot be observed easily without special skills).

Latent defects are of two types, namely:

(1) Defects in the property; and

(2) Defects in the title.

(1) Defects in the Property: Existence of underground culvert or drainage is latent defect in the property.

(2) Defects in the Title: It includes incumbrances, liability of property to the compulsory acquisition, easement rights etc.

***Shaik Buddan Sab vs. Nagamma*, 1977, A.P. 90** – It was held in this case that the doctrine of Caveat Emptor is not applicable to the latent defects of the property.

Facts: Plaintiff purchased 12 acres of land from the Defendant. The plaintiff was disposed of 6 acres since the defendant had no title (defective title). In an action, the defendant pleaded the defence of the doctrine. But the Court rejected and held the defendant liable.

It is to be noted that the doctrine of Caveat Emptor is applicable to patent defects and not to the latent defects.

According to Section 55(1) Seller has a duty to disclose in the following circumstances:

(1) The defect must be material;

(2) It must be latent (not patent);

(3) The seller is aware of it and buyer is not aware of it.

P.S.: 'Caveat Emptor is an important topic for Short Notes.

2. To produce title deed: The seller has to produce the title deed of the property so as to enable the buyer to satisfy himself as to the title.

3. To answer questions as to title: The Seller has a duty to answer the questions put by the Buyer as to title.

Seller's Liability – After Completion of Sale

4. To give possession and to deliver title deeds: After the Sale, the Seller has to give possession of the property and to hand over title deeds to the buyer, on receipt of the price. (Nonpayment of purchase money is not a constraint for passing ownership from Seller to the Buyer).

Buyer's Liability – Before Completion of Sale

1. To disclose facts: The buyer has a duty to disclose facts, which materially increase the value of the property.

2. To pay the price: He has a duty to pay the price (against the execution of sale by seller).

Buyer's Liability – After Completion of Sale

1. To bear losses and to pay outgoings: After completion of Sale, incidental loss, accidental destruction if any has to be borne by the buyer.

Rights of the Seller – Before Sale

1. To claim Rents and Profits: Seller has a right to claim rents, and profits accrued till the completion of sale.

Rights of the Seller – After Sale

1. Vendor's Lien: Lien means right to retain/detain till the dues are cleared. If the purchase money has not been paid completely, seller has a charge over the property though it is in the possession of the Buyer. The charge is not possessor in character. Therefore the seller cannot retain the possession of the property.

Conditions: Vendor's Lien arises provided the following two conditions are satisfied:

1. The buyer has become the owner of the property.
2. Non-payment of purchase money in whole or in part.

The charge may be executed if there is any agreement to that effect.

If the above two conditions are satisfied, the Seller (Vendor) can retain (keep) the property with him till the purchase money is fully paid. This right of vendor is popularly known as 'unpaid vendor's lien'. It was laid down in the leading case of:

Webb vs. Mac Pherson (1904) ILR 32 Cal. 57, 72 – One by name Lloyd, sold a tea estate to Mac Pherson for Rs.80000/- Mac Pherson paid Rs.30000/- in cash and agreed to pay the balance in annual installments. The property was conveyed, but the installments were not paid. After the death of Lloyd, his legal executor, Web sued Mac Pherson for unpaid vendor's charge/lien on the tea estate. The Privy Council held in favour of Web.

In case of Vendor's lien, the period of limitation to enforce the charge is 12 years and to enforce personal remedy is 3 years from the date of approval of the cause of action.

Rights of the Buyer – before completion of sale

1. Right of Lien over the property: Buyer has a right of lien over the property, if the seller fails to complete sale after receiving purchase money. He is entitled to get back the amount and interest.

Rights of Buyer – after completion of sale

1. Right to get increase in value: The Buyer has a right to get increase in value of the property and also rents and profits.

Questions and how to answer

Q. Define Sale and Distinguish between Sale and Agreement to Sell?

Ans. Write the meaning and definition of Sale, agreement to sell (contract of sale) and distinction between the two.

Q. What are the rights and duties of Seller and Buyer before and after completion of sale?

Ans. Write meaning and definition of Sale and then the rights and duties of the seller and buyer, before and after completion of the sale.

Further, questions may be asked on 'Caveat Emptor' and 'Vendor's Lien'.

LECTURE – XII

MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES

[Chapter IV, Sections 58-104]

Chapter IV, containing Sections 58 to 104 of the Transfer of Property Act, 1882 lays down the provisions relating to Mortgages of Immovable Property and Charges. Section 58 defines Mortgage, Mortgagor, Mortgagee and provides for different kinds of Mortgage. Sections 60 to 66 deal with rights and liabilities of Mortgagor. Sections 78 and 79 deal with priority (Section 80 Repealed). Sections 81 and 82 provide for Marshalling and Contribution respectively. Sections 83 and 84 deal with power to deposit mortgage money in the Court. (Section 85, which dealt with suit for Foreclosure, Sale or Redemption and Sections 86 to 90, which dealt with Foreclosure and Sale – Repealed). Sections 91 to 95 deal with Redemption. Section 96 deals with Mortgage by deposit of title deeds (Section 97 Repealed). Section 98 deals with Rights and liabilities of parties to anomalous mortgages (Section 99 Repealed). Finally, Sections 100 to 104 deal with Charge. This lecture covers the following heads:

1. Mortgage : Meaning, Definition and Kinds or Classification of Mortgages (Section 58).
2. Rights and Liabilities of Mortgagor (Sections 60-66).
3. Redemption of Mortgage or Doctrine of Equitable Redemption or 'Once a Mortgage always a Mortgage and nothing but a Mortgage' (Section 60).
4. Rights and Liabilities of Mortgagee (Sections 67-77).
5. Marshalling and Contribution (Section 81 and 82).
6. Right of Subrogation (Section 92).
7. Doctrine of Taking or Prohibition of Taking (Section 93); and
8. Charges (Section 100).

1. MORTGAGE : MEANING, DEFINITION AND KINDS OF CLASSIFICATION OF MORTGAGE

Mortgage: Meaning: "The expression 'Mortgage' literally means transfer of an interest by pleading (delivering) a property as security against an advance as loan; or an existing or future debt; or for performance of an act or engagement, which gives rise to liability". It is a transfer of limited interest of an immovable property as security against a loan, to another.

Section 58(a) of the Transfer of Property Act, 1882 defines the terms Mortgage, Mortgagor, Mortgagee, Mortgage money and Mortgage deed as follows:

According to Section 58(a) of the T.P.Act, 1882 A mortgage is a transfer of interest in specific immovable property for the purpose of security–

(a) The payment of money advanced or to be advanced by way of loan;

(b) An existing or future debt;

(c) The performance of an engagement which may give rise to a pecuniary liability.

In mortgage, the transferor is called 'Mortgagor', the transferee is called 'Mortgagee', the interest secured is called 'Mortgage money' and the instrument/document in which mortgage is effected is called 'Mortgage deed'.

Mortgagor: The person who actually mortgages the property is a mortgagor, but a new Section 59-A introduced by the Amendment Act 20 of 1929 says that a mortgagor includes a person deriving title under the original mortgagor. That section really refers to such persons as heirs, executors, and administrators, who derive their title from the mortgagor. For the purpose of Section 68 (a), however, the term mortgagor does not include the transferee of the mortgagor, for the transferee is not bound by the mortgagor's

personal covenant, though in Clause (c) of that section a subsequent purchaser would be included. Apart from this, the rules which apply to decide the competence of a person to be a transferor equally apply in the case of a mortgagor. Accordingly, when a mortgage is executed by several persons, some of whom are minors and some are pardanashin ladies who have not executed the deed in accordance with law, the execution is not invalid as regards the rest, and the mortgage is valid and binding on them. A mortgage by the minor, who is incompetent to contract, is void. The creditor cannot recover money even under Sections 64 and 65 of Contract Act in case of mortgage by a minor.

Mortgagee: A mortgagee is a person in whose favour a mortgage is created. The term also includes, under the new Section 59-A a person deriving a title under the original mortgagee. Every mortgage deed must name some person as a mortgagee, otherwise it cannot be a mortgage. Thus, a security bond given to the Court cannot be enforced as a mortgage, for the Court is not a judicial person. A mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by other person on his behalf.

Mortgage-money: The expression 'mortgage-money' means "the principal money and interest of which payment is secured for the time being". Accordingly, a mortgagor cannot redeem the property on the repayment only of the principal money. He must also pay the interest thereon because the interest is regarded as a charge upon the property just as much as the principal amounts. The parties are, however, free to enter into any contract to the contrary. But the mere fact that the mortgagors make themselves personally liable for the payment of interest is not compatible with the interest also forming a charge on the property. It must be noted that the interest is provided for by the terms of the mortgage-deed. Where no provision is made for it, the security will only be for the principal money.

Mortgage deed: The definition of mortgage in Section 2 (17) of Stamp Act is wider than in Section 58 (a) of Transfer of Property Act. It includes pawn or pledge of movables and is not restricted to transfer of an interest or right to immovable property. It also includes charge, which creates a right to property.

Amendment: The following amendments have been made by the Amending Act 20 of 1929:

(i) A proviso has been inserted in Section 58(c).

(ii) Section 58 (d) has been made more exhaustive by the inclusion of the case where the mortgagee is entitled to appropriate a portion only of the income of property mortgaged in payment of the mortgage money.

(iii) Clause (f) and (g) have been newly added. The Act recognised a mortgage by deposit of title deeds in Section 59 and an anomalous mortgage in Section 98, but there was no definition of such mortgages before.

Elements of Mortgage: Mortgage constitutes the following elements.

1. Transfer of Interest.
2. Specific Immovable Property.
3. Security.
4. Consideration or purpose.
5. Competence of parties; and
6. Registration.

1. Transfer of Interest: In Mortgage, only an interest in property is transferred. The word transfer of interest signify that the interest, which passes to the mortgagee is not ownership or dominion, which notwithstanding the mortgage resides in the mortgagor. The right of mortgagee is only an accessory right, which is intended merely to secure the due payment of a debt.

2. Specific Immovable Property: The subject matter of mortgage must be a specific immovable property. It must be distinctly specified. The property described in the mortgage deed should be properly identified. Further, the word 'specific' is to be distinguished from the word 'general'. For instance my house and land are said to be vague and general.

3. Security: The purpose of pledging the property is to provide security of payment or performance of work or clearance of a debt.

4. Consideration: Consideration exists in mortgage. Every mortgage must be supported by consideration, which means something in return. The mortgagor mortgages the property in consideration of some advance or an existing or future debt or in performance of an engagement-giving rise to pecuniary liability.

5. Competence of parties: The parties namely, Mortgagor and Mortgagee must be competent to contract. (Within the meaning of Section 11 of the Indian Contract Act, 1872). Further, the mortgagor must have a title or authority to transfer.

6. Registration (Section 59): Registration is necessary if the value of the property is Rs.100/- and above. It is optional, if the value is below Rs.100/-. The registered instrument (if any) is to be signed by the transferor and attested by two witnesses.

Kinds or Classification of Mortgages (Section 58(b) to (g): Section 58(b) to (g) of the T.P.Act deal with different kinds of mortgages as follows:

(1) Simple Mortgages [Section 58(b)].

(2) Mortgage by Conditional Sale (Sections 58(c), 59, 67).

(3) Usufructuray Mortgage (Sections 58(d) & 62 to 68).

(4) English Mortgage [Section 58(c)].

(5) Mortgage by deposit of Title deeds or Equitable Mortgage (Sections 58(f) & 96); and

(6) Anomalous Mortgage [Section 58(b)].

(1) Simple Mortgage [Section 58(b)]: Section 58(b) speaks about Simple Mortgage. It runs as follows:

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly, or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

In this case, there is a transfer of interest. But the possession of the property is retained by Mortgagor. The mortgagee binds himself to pay.

Conditions: To constitute simple mortgage, the following conditions are to be satisfied:

(i) the mortgagor retains the possession of the mortgaged property;

(ii) the mortgagor must personally undertake to pay the mortgage money; and

(iii) the parties must expressly or impliedly agree that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgage property to be sold.

Remedies: In simple mortgage, the Mortgagee will have the following remedies:

(i) He can get the property sold through court in case of default;

(ii) A suit can be instituted in 12 years from the date when the amount falls due.

Registration is compulsory irrespective of the mortgage amount.

(2) Mortgage by Conditional Sale (Section 58(c): Section 58(c) deals with Mortgage by Conditional Sale. It runs as follows:

Where the mortgagor ostensibly sells the mortgaged property–

On condition that on default of payment of the mortgage money on a certain date the sale shall become absolute; or

On condition that on such payment being made the sale shall become void; or

On condition that on such payment being made the buyer shall transfer the property to the seller;

The transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document, which effects or purports to effect to the sale.

In this case, mortgage appears to be a sale. But the sale is ostensible, not real. The transfer of interest in the property is effected subject to the following conditions:

(i) The mortgagor ostensibly sells the mortgaged property.

(ii) He sells the property on condition that:

  (a) on payment of mortgage money the sale shall become void, and the buyer shall transfer the property to the seller on the date fixed;

  (b) on default of payment of the mortgage money on the date fixed, the sale shall become absolute.

(iii) The conditions, which effect or purport to effect the sale, must be embodied in the document of transfer.

The condition is embodied (enshrined) in the instrument/deed/ document.

The world 'ostensible' in Section 58 (c) has two meanings –

(i) that the object bears a certain form or appearance without suggesting that it is or is not that of which it has the superficial appearance; and

(ii) that the object bears a certain appearance but, is not really that of which it bears the appearance.

To decide whether a transaction is a mortgage by conditional sale or an outright sale, its true nature has got to be determined by the intention of the parties thereto as evidenced by the terms of the document.

Registration: Registration is necessary if the mortgage money exceeds Rs. 100/-

Distinction between A 'Simple Mortgage' and 'Mortgage by Conditional Sale'

Simple Mortgage	Mortgage by Conditional Sale
1. Section 58(b) explains about Simple Mortgage.	1. Section 58(c) explains about Mortgage by Conditional Sale.
2. The mortgagor undertakes to repay the money.	2. The mortgagor agrees the condition that on a fixed date, if the mortgage debt is not paid, the property mortgaged deemed to be sold.
3. The mortgagee has to take legal action against the defaulting mortgagor for the recovery of amount.	3. It is not necessary.
4. In a simple mortgage, there is a debt. But no transfer of property is made.	4. There is debt and the transfer is made for the purpose of securing the payment of debt. It is only an ostensible sale.

(3) Usufructuary Mortgage [Section 58(d)]: Section 58(d) of the T.P.Act provides for 'Usufructuary Mortgage'. It runs as follows:

Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee as usufructuary mortgagee.

In the case, possession is transferred to mortgagee. Mortgagee gets rents, profits etc., against the property in lieu of interest or principal or both. The mortgagee has no remedy except enjoyment of property.

Condition: To constitute usufructuary mortgage, the following conditions are to be satisfied:

(i) possession of the property is delivered to the mortgagee;

(ii) the mortgagee is to get rents and profits in lieu of interest or principal or both;

(iii) no personal liability is incurred by the mortgagor; and

(iv) the mortgagee cannot foreclose or sue for sale.

Registration is necessary if the amount is Rs.100/- or above.

(4) English Mortgage [Section 58(e)]: Section 58(e) of the T.P.Act makes provision for English Mortgage. It runs as follows:

Where the mortgagor binds himself to repay the mortgage money on certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage.

In English mortgage, the mortgagor binds himself to pay the mortgage money on a certain date, and transfers the property (immovable) to the mortgagee subject to retransfer on repayment of mortgage money.

Characteristic Features: Following are the characteristic features of the English mortgage:

(i) that the mortgagor should bind himself to repay the mortgage money on a certain day;

(ii) that the mortgaged property should be transferred absolutely to the mortgagee; and

(iii) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor, upon payment by him of the mortgage money on the appointed day.

The general rule in respect of registration (Rs.100/- or above) and the period of limitation (12 years) are applicable for the English Mortgage also.

Distinction between English Mortgage and Mortgage by Conditional Sale

English Mortgage	Mortgage by Conditional Sale
1. The mortgagor has a personal liability to pay the debt.	1. The mortgagor has no personal liability.
2. The mortgagee has the right to judicial sale.	2. The mortgagee has the right to foreclosure.
3. The ownership is transferred to the mortgagee, and the mortgagee enjoys the mesne profits.	3. A qualified ownership is bestowed upon the creditor which by foreclosure proceedings is transferred into an absolute title when the mortgagor commits default.

	English Mortgage	Mortgage by Conditional Sale
4.	The mortgagee has a right to possession.	4. The mortgagee has no such right.

(5) Mortgage by Deposit of Title Deeds or Equitable Mortgage (Section 58(f): Section 58(f) of the T.P.Act provides for the Mortgage by deposit of title deeds. It runs as follows:

Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds.

In this case, Title deed of the immovable property is transferred to mortgagee. Transfer of one important document is enough. (All documents/deeds need not be transferred). This type of mortgage is effected in major towns like Madras, Bombay, Calcutta or those notified by the Government.

Essential features: Following are the essential features of the Mortgage by deposit of title deeds.

(i) a debt;

(ii) deposit of the title deeds; and

(iii) an intention that the deeds shall be security for the debt.

Distinction between Mortgage by Conditional Sale and Mortgage by Deposit of Title Deeds

Mortgage by Conditional Sale	Mortgage by Deposit of Title deed
1. It is explained in Section 58(c).	1. It is explained in Section 58(f).
2. It is an ostensible sale.	2. It is an equitable mortgage.
3. Generally, the property is transferred to mortgagee.	3. Generally, the property is retained by the mortgagor only.
4. There is no restriction on territorial jurisdiction.	4. There is a restriction on territorial jurisdiction.
5. The mortgagor has no personal liability.	5. The mortgagor has a personal liability to pay the debt.
6. A qualified ownership is bestowed upon the creditor which by foreclosure proceedings is transformed into an absolute title when the mortgagor commits default.	6. The mortgagee is entitled to judicial process to recover the debt.
7. Registration is necessary.	7. Registration is not necessary. Mere writing, along with handing over the title deeds is sufficient.

(6) Anomalous Mortgage [Section 58(f)]: Section 58(f) of the T.P.Act speaks about Anomalous mortgage. It runs as follows:

A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of this section is called an anomalous mortgage.

Anomalous mortgage is one, which does not come within the purview of any one of the mortgages as stated above. It is a combination of the two or more mortgages as stated/discussed above.

E.g.: Kanom, Otti, Peruartham of Madras and san mortgage of Gujarat are the examples of the Anomalous mortgage.

2. RIGHTS AND LIABILITIES OF MORTGAGOR [Sections 60 – 66]

In mortgage, mortgagor does not cease to be the owner of the property mortgaged. The interest in property transferred is limited, not absolute. Therefore, law confers on mortgagor certain rights. Sections 60 to 66 of the Transfer of Property Act, 1882 lay down the provisions relating to the rights and liabilities of the mortgagor. Section 60 deals with the right of mortgagor to redeem which is of great importance and is discussed separately in detail under the head 'Redemption of Mortgage or The Doctrine of Equitable Redemption'. Section 60.A (inserted by the Amendment Act of 1929) defines the obligation of a mortgagee to transfer the mortgage debt to a third person named by the mortgagor. Section 60.B (inserted by the Amendment Act of 1929) confers on Mortgagor, right to inspect and take copies of the documents of title relating to the mortgaged property. Section 61 confers on mortgagor, right to redeem separately or simultaneously, where two or more mortgages are executed in favour of the same mortgagee. Section 62 confers on usufructuary mortgagor, right to recover possession of the property together with mortgage deed and other documents. Section 63 deals with accession to mortgaged property. Section 63-A (inserted by the Amending Act 20 of 1929) deals with improvements to mortgaged property. Section 64 provides for renewal of mortgaged lease. Section 65 speaks about implied contracts by mortgagor. Section 65.A deals with mortgagor's power to lease the mortgaged property. Finally, Section 66 imposes an imperative duty on mortgagor, not to commit acts of waste as to reduce the value of the mortgaged property.

1. Right of Redemption (Section 60): The first and most important right of the mortgagor is the right to redeem. It means right to take back the mortgaged property from the mortgagee by repaying the mortgage money within the stipulated period of time. This topic is discussed separately in detail under the head 'Doctrine of Equitable Redemption'.

2. Obligation to transfer to third party instead of retransfer to Mortgagor (Section 60.A): Section 60.A, as inserted/added by the Amendment Act of 1929 defines the obligation of a mortgagee to transfer the mortgage debt to a third person named by the mortgagor. It runs as follows:

Where a mortgagor is entitled to redemption, then, on the fulfillment of any conditions on the fulfillment of which he would be entitled to require a transfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage debt and transfer the mortgaged property to such third person as the mortgagor may direct and the mortgagee shall be bound to assign and transfer accordingly.

The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance; but the requisition of any encumbrance shall prevail over a requisition of the mortgagor and, as between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

Section 60.A empowers the mortgagor to require the mortgagee to assign the mortgage debt and transfer the mortgaged property to a third person directed by him. This is possible only on the fulfillment of any condition on the fulfillment of which he would be entitled to require a retransfer.

The object of this section is to help the mortgagor to pay off the mortgagee by raising a loan from another person on the same security.

3. Right to Inspection and Production of Documents (Section 60.B): Section 60.B, as inserted by the Amending Act of 1929, confers on mortgagor, right to inspect and take copies of the documents of the title relating to the mortgaged property. It runs as follows:

A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies of abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee.

This section recognises the right of mortgagor to inspection and copies of deeds of title relating to the mortgaged property which are in the custody of the mortgagee. The cases which denied this right of inspection are no longer good law.

4. Right to redeem separately or simultaneously (Section 61): Section 61 confers on mortgagor, right to redeem separately or simultaneously, where two or more mortgages are executed in favour of the same mortgagee. It runs as follows:

Before the passing of the present Act, the doctrine of consolidation of mortgages was recognised, under which the mortgagor seeking redemption was bound to redeem all subsisting mortgages in favour of the same person in respect of the same property. Amendment Act, 1929, abolished the doctrine of the consolidation of mortgages. But this section abolished consolidation where different properties were mortgaged, and not where the same property was mortgaged under several mortgages. The result was that a mortgagee who had successive mortgages of the same property could consolidate them and compel that all mortgages should be redeemed together. This was inequitable and was altered by the Amendment Act of 1929 which omits all references to property and thereby abolishes consolidation of mortgages whether in respect of the same property or different properties.

Illustrations: 1. A, the owner of farms Z and Y, mortgages Z to B for Rs.1000 and afterwards mortgages Y to B for Rs.1000. A may institute a suit for the redemption of the mortgage of Z alone, B, the mortgagee, cannot compel A to redeem both Z and Y together.

2. A, the owner of farm Z, mortgages Z to B for Rs.5000. Later, A mortgages Z again to B for Rs.3000. When the principal money becomes due, A may redeem either the prior mortgage of Rs.5000 or latter mortgage of Rs.3000 or both.

5. Right of usufructuary Mortgagor to recover possession (Section 62): Section 62 confers on the usufructuary mortgagor, right to recover possession of the property together with mortgage deed and other documents. It runs as follows:

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee–

(a) where the mortgagee is authorized to pay himself the mortgage money from the rents and profits of the property – when such money is paid.

(b) Where the mortgagee is authorized to pay himself from such rents and profits or any part thereof a part only of the mortgage money – when the term (if any) prescribed for the payment of the mortgage money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in Court as hereinafter provided.

Comments: The section has been amended by the Amendment Act 20 of 1929, and the amendments make the section correspond with the definition of usufructuary mortgage in Section 58(d).

This section would be read along with Section 60 which lays down that a mortgagor who wants to redeem must pay the mortgage money. In case of a usufructuary mortgage, special provision is

made in this section as to when the mortgagor can recover possession of the mortgaged property. Under the terms of the section, in cases where the mortgagee is authorized to pay himself out of the rents and profits of the property, the mortgagor can recover possession only when such money is realised. He cannot pay cash and recover possession. If, on the other hand, the mortgage deed provides for the payment only of interest or part of the mortgage money out of the income, a term may be fixed for the payment of the principal or the balance of the mortgage money, as the case may be. In such a case, the mortgagor can recover possession on the expiry of the term and on payment or tender to the mortgagee of the mortgage money or the balance thereof.

6. Accession to mortgaged property (Section 63): Section 63 deals with accession to mortgaged property. It runs as follows:

Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession.

Accession acquired in virtue of transferred ownership: Where such accession has been acquired at the expense of the mortgagee, and is capable of separate possession or enjoyment without detriment to the principal property, the mortgagor desiring to take the accession must pay to the mortgagee the expense of acquiring it. If such separate possession or enjoyment is not possible, the accession must be delivered with the property; the mortgagor being liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal, or where no such rate is fixed at the rate of nine per cent per annum.

In the case last mentioned the profits, if any, arising from the accession shall be credited to the mortgagor.

Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any, arising from the accession shall, in the absence of a contract to the contrary, be set off against interest, if any, payable on the money so expended.

Any addition to the mortgaged property is called accession. This accession or addition may be brought either by the nature or by the efforts of the mortgagee. However the 'accession' primarily denotes physical accretions or addition whether brought about by natural or artificial means.

The general rule is that where mortgaged property in possession of the mortgagee has received any accession, the mortgagor upon redemption is entitled to such accession. This is based on the equitable maxim '*accession credit principle*' i.e. the increase follows the principal. It is enunciated in Section 63 of the T.P.Act, which is similar to Section 90 of the Indian Trust Act.

Accession or addition may arise in any one of the following:

1. Natural causes.
2. Acquired by the mortgagee's own cost.

1. Natural Causes: The natural accession of the mortgaged property ensures a benefit to the mortgagee and his family but at the same time it is subject to the redemption by mortgagor. So it goes to the mortgagor.

2. Acquired by the Mortgagee's own cost: The acquired accession can be sub divided into

(i) Accession which are separable; and

(ii) Accession which are inseparable.

Separable Accessions: When the accessions are acquired by the mortgagee's own cost which are separable from the security shall go to the mortgagee. But if the mortgagor desires to retain them, the mortgagee can surrender them by receiving the cost.

Inseparable Accessions: When the accession acquired by the mortgagee's own cost cannot be passed or enjoyed by the mortgagee separately from the security, it must be delivered with the property. However, the mortgagor is bound to pay the compensation only in two cases:

(a) where it was forfeiture of sale *Nannumal vs. Ramachandra*, 1931 ALJ 275;

(b) Where it was made with the mortgagor's consent.

In cases where the mortgagor is bound to pay the compensation, he is liable to pay the interest on such cost. The rate of interest should be same what he pays to the mortgagee. If it is not fixed, he should pay at the rate of nine percent per annum.

7. Improvements to mortgaged property (Section 63-A): This section was introduced by the Amending Act 20 of 1929, bears specifically on the point of improvements. Before that, the Act was silent as to improvements by a mortgagee.

Section 63-A is special provision dealing with improvements effected by a mortgagee in possession.

Section 63-A runs as follows:

Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement and the mortgagor shall not, save only in cases provided for in sub section (2), be liable to pay the cost thereof.

Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with

interest at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement, shall be credited to the mortgagor.

8. Renewal of Mortgaged lease (Section 64): Section 64 provides for the renewal of mortgaged lease. The old section referred to a lease 'for a term of years'. The words 'for a term of years' have been omitted by the Amending Act 20 of 1929 as unnecessary.

Section 64 runs as follows:

Where the mortgaged property is a lease, and the mortgagee obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.

9. Implied contracts by mortgagor (Section 65): This section makes provisions of the implied contract by the mortgagor for the benefit of the mortgagee. It runs as follows:

In the absence of a contract to the contrary, the mortgagor shall be deemed to contract with the mortgagee–

(a) that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same;

(b) that the mortgagor will defend, or, if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgagor's title thereto;

(c) that the mortgagor will, so long as the mortgagee is not in possession of the mortgaged property, pay all public charges accruing due to the property;

(d) and, where the mortgaged property is a lease, that the rent payable under the lease, the conditions contained therein, and the contracts binding on the lessee have been

paid, performed and observed down to the commencement of the mortgage; and that the mortgagor will, so long as the security exists and the mortgagee is not in possession of the mortgaged property, pay the rent reserved by the lease, or, if the lease be renewed, the renewed lease, perform the conditions contained therein and observe the contracts binding on the lessee, and indemnify the mortgagee against all the claims sustained by reason of the nonpayment of the said rent or the non performance or non observance of the said conditions and contracts;

(e) and, where the mortgage is a second or subsequent encumbrance on the property, that the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due, and will at the proper time discharge the principal money due on such prior encumbrance.

The benefit of the contracts mentioned in this section shall be annexed to and shall go with the interest of the mortgagee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

10. Mortgagor's power to lease (Section 65.A): This section was added/inserted by Section 30 of the Amendment Act of 1929. It runs as follows:

(1) Subject to the provisions of sub section (2), a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2)(a) Every such lease shall be such as would be made in the ordinary course of management of the property concerned and in accordance with any local law, custom or usage.

(b) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years, and the lease shall contain a covenant for payment of the rent and a condition of reentry on the rent not being paid within a time therein specified.

3. The provisions of sub section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and the provisions of sub section (2) may be varied or extended by the mortgage deed and, as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub section.

11. Waste by Mortgagor in possession (Section 66): Section 66 imposes an imperative duty on mortgagor not to commit any acts of waste as to reduce the value of the mortgaged property. It runs as follows:

A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate; but he must not commit any act which is destructive or permanently injurious thereto, if the security is insufficient or will be rendered insufficient by such act.

Explanation: A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one half, the amount for the time being due on the mortgage.

3. REDEMPTION OF MORTGAGE

(Mortgagor's Right of Redemption or Doctrine of Equitable Redemption or Once a Mortgage always a mortgage and nothing but a mortgage)

Among the rights of mortgagor, the right of redemption is of great importance. Section 60 of the Transfer of Property Act. 1882 confers on mortgagor, right to redeem. It means 'right to take back the mortgaged property from the mortgagee by repaying the mortgage money within the stipulated period of time. Section 60 runs as follows:

At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage money, to require the mortgagee–

(a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee;

(b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor; and

(c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of the Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the

principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property: Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Redemption of Mortgage: The expression 'Redeem' means "Repurchase". In mortgage, it means 'paying off the mortgage money to get back the mortgaged property'. This right of mortgagor against mortgagee is called 'Right of Redemption' or 'Doctrine of Equitable Redemption'.

In England, this right of redemption is available to the mortgagor for stipulated period under common law. But in the Courts of equity, this right is not lost after the stipulated period. There is no such distinction in Indian Law. Section 60 of the T.P.Act confers statutory right on the mortgagor to redeem the property even after the expiry of the stipulated period.

The right of redemption is a statutory right, and the parties are prohibited to put any condition, which takes away this right.

Exceptions: The right of redemption may be extinguished under the following cases:

(1) By act of parties.

(2) By operation of law; and

(3) By decree of the Court.

Once a mortgage always a mortgage and nothing but a mortgage: The view 'Once a mortgage always a mortgage and nothing but a mortgage' was enunciated by House of Lords in a leading case *Noakes vs. Rice* (1902) AC 24. In this case, Lord

Devay supplemented (added) the words 'and nothing but a mortgage' to a well known maxim 'Once a mortgage always a mortgage'.

As stated above, the right of redemption is a statutory right conferred on the mortgagor under Section 60 of the T.P.Act. This statutory and permanent right of mortgagor gives rise to a well-known maxim 'Once a mortgage always a mortgage'. It means once mortgage deed is entered into, it can never be changed because change, if any affects the right of redemption. Lord Devay supplemented (added) the words 'and nothing but a mortgage' in the leading case. The above view was laid down by House of Lords through Lord Devay in–

Noakes vs. Rice (1902) AC 24: In the instant case, Rice mortgaged his premises and goodwill to Noakes & Company, subject to recovery of the premises against the repayment of all the money with interest. There was a covenant in the mortgage deed that during the term, Rice shall not use or sell upon the premises, any malt liquors, not exclusively obtained by Noakes & Company. Held that Rice was entitled to redemption. Since, the covenant was a clog on the equity of redemption, it was declared void. On appeal, the House of Lords confirmed this view and laid down the following three principles:

(1) Once mortgage is always a mortgage. Mortgage cannot be made irredeemable and provision if any to that effect is void.

(2) The Mortgagee shall not reserve to himself any collateral advantages outside the mortgage contract; and

(3) Any stipulation restraining or preventing the mortgagor's right of redemption is void.

In other words, there should be no clog or fetter on the equity of redemption. Any stipulation which makes mortgage transaction inconsistent with the right of redemption is called 'Clog on Redemption'.

The right of redemption is not only a statutory right recognised under Section 60 of the T.P.Act, 1882, but also equitable right since it is available to the mortgagor even after the expiry of the stipulated period for payment of the mortgage money. Right of redemption is an indefeasible right given to the mortgagor and it cannot be separated from Mortgage. Any agreement, which takes away this right, is an oppressive bargain and is void. An agreement conferring collateral benefit on the mortgagee also amounts to clog on redemption. It has been decided in *Noakes & Company vs. Rice,* 1914 AC 75.

However, in *Kreglinger vs. New Patagonia Meat Cold Storage Company,* it was decided that collateral advantages can be enforced against the mortgagor provided there is nothing unreasonable about them.

In this case a mortgage was executed in 1910 by a meat purchasing company in favour of a firm of wool brokers wherein, the mortgagee stipulated that for five years the mortgagor company should not sell sheep skins to any one other than the mortgagee so long as they were willing to pay at the market price. The loan could be paid off at anytime. It was paid off in 1911. The Court held that collateral advantages could be enforced even after redemption, provided these conditions were satisfied:

(1) that it is not unfair and unconscionable;

(2) that it is not the nature of penalty to clog the equity of redemption;

(3) that it is not inconsistent or repugnant to the equity of redemption.

Application of Kreglinger's Rule in India: Section 60 of the Act has invalidated the Kreglinger's rule and hence it has no application in India. If any stipulation operated beyond redemption, it is void.

Instances of Clog on Redemption: The following are the instances of clog on redemption:

(1) A condition of sale in default.

(2) A condition restraining the alienation during mortgage.

(3) A condition of long term for redemption.

(4) A condition postponing the redemption in case of default.

(5) Redemption restricted to the mortgagor.

(6) A condition to grant permanent lease to the mortgagee.

(7) Penalty in case of default; and

(8) A onerous condition extending beyond the redemption.

What is not Clog: The following are not treated as Clog:

(1) Sale subsequent to the mortgage.

(2) High rate of interest.

(3) Remuneration to the mortgagee.

(4) Lease during mortgage.

(5) Right of preemption by mortgagee; and

(6) Condition for redemption of prior mortgagee.

4. RIGHTS AND LIABILITIES OF MORTGAGEE [Sections 67 – 77]

Sections 67 to 77 of the Transfer of Property Act, 1882 lay down the provisions relating to the rights and liabilities of the Mortgagee as detailed below:

1. Right to foreclosure or sale: The term 'foreclosure' literally means, "to take legal measures to terminate a mortgage and to take possession of the mortgaged property. A mortgagor under Section 60 is entitled to the right of redemption. Section 67 provides for corresponding right, the right of foreclosure or sale to the mortgagee. Right to Foreclosure means that when the mortgagor's right to redeem has become complete and he has failed to avail himself thereof, the mortgagee has the right to apply to the court for a decree that the mortgagor shall be absolutely debarred of his right to redeem the mortgaged property. Section 67 runs as follows:

Foreclosure is the method by which the mortgagee acquires the property freed from the mortgagor's right of redemption. That means, it gives rights to the mortgagee to institute a suit for foreclosure or sale in default by the mortgagee to institute a suit for the deed for payment has arrived, there is no question of foreclosure that would arise. If the mortgagor has paid or deposited the mortgage money, or if a decree for redemption is made, the mortgagee is not entitled to exercise the right of foreclosure or sale.

Right of Sale: Right of sale means right of the mortgagee to apply to the court for the sale of mortgaged property for satisfaction of his debt.

Difference between Foreclosure and the Right of Sale:

(a) By means of foreclosure, the mortgagee becomes the absolute owner by the property and mortgage debt is absolutely discharged, whereas by means of judicial sale, mortgagee realizes the actual value of the property and can recover balance, if the sale proceeds are not sufficient to satisfy the mortgage debt.

(b) Foreclosure is possible only by suit, whereas sale is possible either out of court or by means of suit.

2. Mortgagee when bound to bring one suit on several mortgages (Section 67.A): A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under Section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due.

3. Right to sue for mortgage money (Section 68): Section 68 has been redrafted by the Amending Act 20 of 1929. It runs as follows:

(1) The mortgagee has a right to sue for the mortgage money in the following cases and in no others, namely:

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of Section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession for the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor;

Provided that, in the case referred to in Clause (a), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage money.

2. Where a suit is brought under Clause (a) or Clause (b) of sub section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfer the mortgaged property.

4. Power of sale when valid (Section 69): Section 69 deals with the power of a mortgagee to sell the mortgaged property without the intervention of the Court. It runs as follows:

(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage money, without the intervention of the Court, in the following cases and in no others, namely–

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed, and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage deed, and the mortgaged property or any part thereof was, on the date of the execution of the mortgage deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until –

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrears and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the

ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any;, to which the sale is not made subject, or after payment into Court under Section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgage money and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipt for the proceeds of the sale thereof.

Nothing in this section or in Section 69.A applies to powers conferred before the first day of July 1882.

5. Appointment of receiver (Section 69.A): Section 69.A, inserted by the Amending Act 20 of 1929 empowers the mortgagee (who can exercise a power of sale under Section 69, T.P.Act) to appoint a Receiver. It runs as follows:

(1) A mortgagee having the right to exercise a power of sale under Section 69 shall, subject to the provisions of sub section (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgage deed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing

such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee, in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, or for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent, on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:

(i) in discharge of all rents, land revenue, rates and out goings whatever affecting the mortgaged property;

(ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(iii) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(iv) in payment of the interest falling due under the mortgage;

(v) in or towards discharge of the principal money, if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of the sub section (1) apply only if and as far as a contrary intention is not expressed in the mortgage deed; and provisions of sub sections (3) to (8) inclusive may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said sub sections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application, as the Court may think fit.

The costs of every application under this sub section shall be in the discretion of the Court.

(11) In this section, 'the Court' means the Court, which would have jurisdiction in a suit to enforce the mortgage.

6. Accession to mortgaged property (Section 70): If, after the date of a mortgage, any accession is made to the mortgaged property, it corresponds to Section 63, which deal with the mortgagor's right to accessions. Section 70 runs as follows:

If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Illustrations:

(a) A mortgages to B a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, B is entitled to the increase.

(b) A mortgages a certain plot of building land to B and afterwards erects a house on the plot. For the purposes of his security, B is entitled to the house as well as the plot.

7. Renewal of mortgaged lease (Section 71): When the mortgaged property is a lease, and mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to new lease.

8. Rights of mortgagee in possession (Section 72): A mortgagee may spend such money as is necessary–

(a) for the preservation of the mortgaged property from destruction, forfeiture or sale;

(b) for supporting the mortgagor's title to the property;

(c) for making his own title thereto good against the mortgagor; and

(d) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, add such money to the principal money, at the rate of interest payable on the principal, and, where no such rate is fixed, at the rate of nine percent per annum.

Provided that the expenditure of money by the mortgagee under Clause (b) or Clause (c) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgagee may also, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of such property; and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or, where no such rate is fixed, at the rate of nine percent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage deed or (if, no such amount is therein specified), two thirds of the amount that would be required in case of total destruction to reinstate the property insured.

Nothing in this section shall be deemed to authorize the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure.

9. Right to proceeds of revenue sale or compensation on acquisition (Section 73): Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894 (1 of 1894); or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation.

Such claims shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Section 74 & 75 – Repealed by Section 39 of the Transfer of Property (Amendment) Act (XX of 1929).

10. Liabilities of mortgagee in possession (Section 76): When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property–

(a) he must manage the property as a person of ordinary prudence would manage it if it were his own;

(b) he must try his best to collect the rents and profits thereof;

(c) he must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;

(d) he must, in the absence of a contract to the contrary, make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits, the payment mentioned in Clause (c) and the interest on the principal money;

(e) he must not commit any act which is destructive or permanently injurious to the property;

(f) where he has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy, or so much thereof as may be necessary, in reinstating the property, or, if the mortgagor so directs, in reduction or discharge of the mortgage money;

(g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage, give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported;

(h) his receipts from the mortgaged property, or, where such property is personally occupied by him, a fair occupation rent in respect thereof, shall, after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and the other expenses mentioned in Clauses (c) and (d), and interest thereon, be debited against him in reduction of the amount (if any), from time to time due to him on account of interest, and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; the surplus, if any, shall be paid to the mortgagor;

(i) when the mortgagor tenders, or deposits in the manner hereinafter provided, the amount for the time being due on the mortgage, the mortgagee must, not withstanding

the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender or from the earlier time when he could take such amount out of Court, as the case may be and shall not be entitled to deduct any amount therefrom on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss occasioned by his default: If the mortgagee fails to perform any of the duties imposed upon him by this section, he may when accounts are taken in pursuance of a decree made under this Chapter, be debited with the loss, if any, occasioned by such failure.

11. Receipts in lieu of interest (Section 77): Nothing in Section 76, Clauses (b), (d), (g) and (h), apply to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

Priority

Postponement of prior mortgagee (Section 78): Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Mortgage to secure uncertain amount when maximum is expressed (Section 79): If a mortgage made to secure future advances, the performance of an engagement or the balance of a running account, expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgagee, be postponed to the prior mortgagee in respect of all advances or debits not exceeding the maximum, though made or allowed with notice of the subsequent mortgage.

Section 80 omitted/repealed by Section 41 of Act 20 of 1929 and reproduced in Section 93.

5. MARSHALLING AND CONTRIBUTION (Sections 81 and 82)

Sections 81 and 82 are the most important sections, which deal with the doctrine of Marshalling and Contribution respectively. The former protects the interest of the Mortgagee, while the latter protects the interest of the mortgagor.

1. THE DOCTRINE OF MARSHALLING [Section 81]

The word 'Marshalling' literally means "to arrange or to rank in order". It means "arranging or setting the claims of two persons in respect of certain common property". Section 81 of the T.P.Act deals with the doctrine of Marshalling. It deals with the rights of the mortgagees *inter se*. It protects the interest of the subsequent mortgagee in respect of the property mortgaged to him. Section 81 runs as follows:

If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the right of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

Amendment: The redrafting of the old section by the Amending Act 20 of 1929 has enlarged the scope of this section. It now applies to several properties and to several successive mortgages. It has thus been brought into line with Section 56, and marshalling may be claimed not only by the second mortgagee but by any subsequent mortgagee. Again the condition of notice has been dispensed with; and lastly the word 'valuable' before

consideration has been omitted, for the law in India does not recognize any distinction between good and valuable consideration.

When the right of Marshalling arises: Where there are two creditors of the same debtor, and one creditor has the right to resort only to one fund, the court will order the first creditor to be paid out of the fund against which the second creditor has no claim, so far as that fund will extend, so as to leave as much as possible of the second fund for payment of the second creditor. If the first creditor has already paid him out of the second fund, the court will allow the second creditor to stand in his shoes and resort to the first fund to the extent to which the second fund has been exhausted by the first creditor.

Where a Mortgagor (owner) mortgages two or more properties to one person, and then (later/subsequently) mortgages one or more of the properties to another person, the subsequent mortgagee may request the prior (previous) mortgagee to realise the debt only from the property or the security which is not mortgaged to the puisne (subsequent) mortgagee.

E.g.: 'A' mortgages property 'X' and 'Y' to 'B'. Subsequently 'A' also mortgages property 'X' to 'C'.

In this example 'B' has 1st charge on 'X' and 'Y'. 'C' has second charge on property 'X' but has no charge directly on property 'Y'. However 'C' can request 'B' to transfer the charge for remaining value against property 'Y', in his ('C's) favour to realise his debt.

Underlying Principle: The doctrine of Marshalling is based on the principle of equity and laid down in the case of *Aldrich vs. Copper* (1803) 8 Ves. 382, which reads as follows:

When a Creditor has two funds, the interest of the debtor shall not be regarded. Such Creditor shall take that fund which

pays him, and shall leave the remaining for another Creditor, and that it shall not affect the interest of a third party/person.

Essentials of the Doctrine of Marshalling:

(1) There must be a common debtor of two or more mortgages against the same mortgaged property.

(2) The prior mortgagee should not be prejudiced.

(3) It should not cause prejudice to third person's interest also.

(4) There should be no agreement contrary to that effect.

Limitations or Exceptions: The doctrine does not apply in the following cases:

(1) The doctrine does not apply if it causes prejudice to the prior mortgagee.

(2) The doctrine does not apply if it is prejudiced to third party who acquired interest in property for consideration.

In the above example, 'A' has also mortgaged property 'Y' to 'D' who acquired interest in property for consideration; 'C' cannot compel 'B' to adjust his debt against the property 'Y' (of 'A').

(3) The doctrine does not apply unless the mortgagor is the common debtor for both the creditors (mortgagees).

(4) The doctrine does not apply where a portion of the property is mortgaged and the same is mortgaged subsequently to another.

(5) The benefit under this doctrine does not apply (extend) to lessee.

Venkayya vs. Venkataramayya, AIR 1930 Mad. 171 – In this case, A and B own properties X and Y respectively. A and B mortgaged their properties X and Y to C. A and B had separate interests in the properties X and Y. Subsequently, B alone mortgaged his interest in his property, Y to D. Later, D made a request for the marshalling of the properties X and Y. The Madras High Court held that D is not entitled to the right of marshalling on the ground

that there was no common debtor. Similar view was laid down by this Court in *Ramaswamy Chetty vs. Madhura Mills Co.* (1916) 1 Mad.WN 265.

2. DOCTRINE OF CONTRIBUTION [Section 82]

The Doctrine of Contribution refers/pertains to mortgages, where there are two or more mortgagors for the same property/ properties. The doctrine of contribution is a corresponding right of the mortgagor against mortgagee's right of marshalling. Just as marshalling is an adjustment between the mortgagees, the right of contribution is an adjustment between the mortgagors. Section 82 of the T.P.Act, 1882 deals with the 'Doctrine of Contribution'. It refers to distribution of liability between/among the debtors (i.e. mortgagors). Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute ratably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property, each property is, in the absence of a contract to contrary, liable to contribute ratably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid.

Nothing in this section applies to a property liable under Section 81 to the claim of the subsequent mortgagee.

Amendments: The amendment by the amending Act 20 of 1929 makes two modifications. In the first place, it covers cases not only where several properties are mortgaged but where mortgaged property is subsequently divided into shares held in severality. And in the second place it fixes the date of the mortgage on the date at which the valuation for the purpose of contribution should be made. The words 'in the absence of a contract to the contrary' relate to a contract to which the mortgagee is a party and not to one between co-mortgagors. In the third paragraph the word 'subsequent' has been substituted for the word 'second'. This amendment is merely consequential. The Privy Council has held that the amendments are not retrospective.

Meaning: Sometimes, two or more properties separately owned by different persons are mortgaged jointly to the same Mortgagee for securing a debt. In such a case, if one Mortgagor repays the entire debt, the other Mortgagors are released from the liability. Then, the Mortgagor, who cleared (paid off) the debt, has a right to claim from other Mortgagor/Mortgagors for the amount paid on his/their behalf. In other words, he is entitled to the right of Contribution. This obligation of other Mortgagor/Mortgagors to repay is enshrined in the 'Doctrine of Contribution' and inserted in Section 82 of the T.P.Act.

Illustration: A and B, two brothers mortgaged their joint property to C for Rs.10000/-. After the mortgage they effected a partition of the property each taking one half. On the failure of A and B to redeem the mortgage, C sold A's share and realized his money. A is entitled to claim contribution from B which shall be Rs.5000/-.

Incidents or Circumstances: The doctrine applies under the following incidents or circumstances:

(1) Where the properties mortgaged belong to two or more persons; and

(2) Where the property/properties mortgaged belongs to single person.

1. Owned by two or more persons: Where different properties are owned by two or more persons and are mortgaged jointly to the same mortgagee for securing a debt, all the mortgagors have a joint obligation to release the debt. If one Mortgagor alone releases the debt, the other mortgagors have an obligation to contribute (or repay their respective share) to the Mortgagor who cleared the debt.

E.g.: Property 'X' belongs to 'A'.

Property 'Y' belongs to 'B.

Property 'Z' belongs to 'C'.

'X' 'Y' 'Z' are mortgaged jointly by 'A' 'B' 'C' to a mortgagee for Rs.15000 and they (A B C) enjoyed the amount equally (i.e. @ Rs.5000/- each). If 'A' repays the entire debt, 'B' and 'C' have an obligation to contribute. ('B' and 'C' have to repay their respective share of Rs.5000/- each to 'A').

2. Properties owned by one person: Out of different properties belonging to a person, one property is mortgaged to one mortgagee, and two or more properties jointly to another mortgagee, and the latter sells the mortgaged properties to others, then contribution arises between the purchasers.

Distinction between Marshalling and Contribution: The Doctrine of Marshalling and the Doctrine of Contribution confer certain rights on the parties to the Mortgage. Both the doctrines are based on the principles of Equity. However, there are certain differences between these two doctrines. The following points draw a line between the two.

Doctrine of Marshalling (Section 81, T.P.Act)	Doctrine of Contribution (Section 82, T.P.Act)
1. It refers to Mortgagees.	1. It refers to Mortgagors.
2. In Marshalling, debtor (Mortgagor) is common, but Mortgagees are two or more (and different).	2. There are two or more Mortgagors. The Mortgagee may be one or more.
3. This doctrine settles the conflicting (competing) rights between/ among Mortgagees.	3. This doctrine settles the conflicting/competing interests/rights between Mortgagors or Purchasers, in case of subsequent sale.
4. In marshalling, the Creditor (Mortgagee) has an option to confine to one security leaving the other securities, where there are more than one security.	4. In Contribution, there is no such option. All Securities shall contribute equally.

In case there is a conflict between Marshalling and Contribution, Marshalling supersedes the Contribution.

6. RIGHT OF SUBROGATION [Section 92]

Section 92 of the Transfer of Property Act, 1882 makes provision for the right of subrogation. It runs as follows:

Any of the persons referred to in Section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage have, so far as regards redemption, foreclosure of sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has, by a registered instrument, agreed that such person shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

The expression 'Subrogation' literally means 'transfer of right from one person to another'. It means that one person is substituted for another in regard to the latter's rights and liabilities in a certain matter. In mortgage, it refers to transfer of mortgagee's right against the mortgagor to a person, who met the liability. The right of such person is called the right of 'Subrogation'.

In Mortgage, Mortgager has a right of redemption against the mortgagee on repayment. Sometimes, any person other than the mortgagor may repay the entire amount to the mortgagee. Such other person is entitled to all rights of the mortgagee. In other words, he enters into the shoes of the mortgagee. He is called 'Subrogee' and his right is called 'Right of Subrogation'.

The term 'Subrogation' is derived from Roman Law, which means 'Substitution'. Subrogation means 'Substitution for person redeeming is substituted for the incumberancer whom he has paid off. For instance, if a surety of a mortgage releases mortgagor by paying off to the mortgagee, he (surety) is substituted in the place of mortgagee.

Prior to the amendment in 1929, the right of subrogation was available only to the subsequent mortgagee. Now, it is made available to all those who have interest in the property mortgaged (Section 91).

Kinds of Subrogation: Subrogation is of two kinds as follows:

(1) Legal Subrogation; and

(2) Conventional Subrogation.

(1) Legal Subrogation: Legal Subrogation arises by operation of law. Paragraph one of Section 91 deals with Legal Subrogation and the persons acquire the right of subrogation. Legal Subrogation arises, when a person having interest in the property, to protect his own interest discharges a prior encumbrance. Following are the persons having the right of legal subrogation:

(i) Puisne Mortgagee;

(ii) Surety;

(iii) Co-mortgagor; and

(iv) Purchaser of the Equity of Redemption.

(i) Puisne Mortgagee: He is one, who redeems a prior mortgage. He has a right of subrogation to occupy in the place of prior mortgagee.

E.g.: 'A' mortgages 'X' to 'B' for Rs.20,000/-

E.g.: 'A' mortgages 'X' to 'C' for Rs.15,000/-

In the illustration, 'C' being the assignee of equitable right of redemption can be substituted in the place of 'B' by paying the entire debt to him.

(ii) Surety: Surety is also entitled to redeem the mortgaged property and has a right to be subrogated in the place of the creditor.

(iii) Co-Mortgagor: A Co-Mortgagor also will have the right of subrogation.

E.g.: 'A' and 'B' having same interest (share) in property 'X'. They jointly mortgaged 'X' to 'C' for Rs.20,000/- and shared the amount equally. Later, 'A' alone paid off the entire amount i.e. Rs.20,000/- Now, 'A' is entitled to the right of subrogation by standing in Mortgagee's (C's) position to the extent of excess amount paid.

(iv) Purchaser of the Equity of Redemption: He is entitled to the right of subrogation

E.g.: 'X' mortgaged his property first to 'A', and later to 'B'. 'X' has a right of redemption. If 'C' pays off the first mortgagee (i.e. 'A'), 'C' takes up the position of 'A' under the right of subrogation.

2. Conventional Subrogation: Conventional Subrogation takes place, where the mortgage debt is paid off by a person who has no interest in the security. He may be even a stranger. It must be in writing and signed by the mortgagor, and it requires registration.

7. DOCTRINE OF TACKING OR PROHIBITION OF TACKING
[Section – 93]

'Tacking' means, "uniting securities given at different times." Section 93 of the T.P.Act deals with prohibition of taking. It runs as follows:

No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and, except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

This section prohibits tacking, i.e. uniting of securities given at different times. However, it recognises an exception to this prohibition i.e. where there is a mortgage to secure further advance and the maximum is specified. A tacking may be explained in the following manner:

A mortgages his property X to B. Then he mortgages X to C and then to D. D pays the amount to B which he had advanced to A, and thus acquires the place of B. If there is no prohibition of tacking, D will acquire priority over C not only in respect of the amount which he had paid to B but also in respect of money which is due to him from A.

The doctrine of tacking for the purpose of squeezing out an intermediate mortgagee was never recognised in India and it was expressly prohibited by Section 80 of the Transfer of Property Act, which has been re-enacted as Section 93 of the Act by the Amending Act of 1929.

Section 93 of the Transfer of Property Act now declares that no mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgagee shall thereby acquire any priority in respect of his original security. The net result is that a third mortgagee paying off the first mortgagee acquires priority with respect to the mortgage which he redeems and not with respect to his own mortgage.

The doctrine of tacking has been abolished in England by Section 94 of the Law of Property Act, 1925 with effect from 1st January 1926.

8. CHARGES
[Section 100]

Sections 100 and 101 of the Transfer of Property Act, 1882 lay down the provisions relating to 'Charges' and run as follows:

Charges (Section 100): Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.

No merger in case of subsequent encumbrance (Section 101): Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto.

Charge is a form of security for the payment of a debt or performance of an obligation consisting of the right of a creditor to receive payment out of some specific fund or out of the proceeds of the realisation of specific property. Such fund or property is said to be the charge.

Section 100 of the T.P.Act defines charge as 'where immovable property of one person is by the act of parties or operation of law made security for payment of money to another and the transaction does not amount to mortgage, the latter person is said to have a charge on the property.

Elements: A charge contains the following elements:

(1) Immovable property of one person is made security for the payment of money of another;

(2) Property is made security–

(a) by act of parties; or

(b) by operation of law; and

(3) The transaction does not amount to a mortgage.

Kinds of Charge: As stated above, charge takes place in two ways namely–

(1) Charge by act of parties; and

(2) Charge by operation of Law.

1. Charge by act of parties: An agreement, which gives immovable property as security for the satisfaction of a debt without transferring any interest in the property constitutes a charge by the act of parties. The following are the illustrations of charges by the acts of parties.

(i) A inherited an estate from his maternal grandmother and executed an agreement to pay his sister B a fixed annual sum out of the rents of the estate, B has charge on the estate.

(ii) A sued B on a promissory note. The compromise decree directed the payment of the money and further directed that B shall not dispose of his share in a factory until satisfaction of the entire decretal amount. It was held that A had a charge on the property specified.

No particular form of word is needed for the creation of a charge. It is sufficient if having regard to all the circumstances of the transaction, the document shows an intention to make the land security for the payment of money mentioned therein. Further, the Act nowhere prescribes any particular mode of creating orally. Where, however, it is created by an instrument, such instrument must be registered unless the amount involved is less than Rs.100. [Section 17(1)(b) of the Registration Act].

2. Charge operation of law: A charge by operation of law is one, which arises irrespective of the agreement of the parties. Such charges are known as equitable liens in English Law.

Following are the instances of charge by law or charge by operation of law.

(a) Unpaid Vendor's Lien (Section 55 Clause (4).

(b) Vendee's charge for pre paid purchased money under Section 55(6).

(c) Marshalling of securities under Section 82 – charge in favour of a person entitled to contribution.

(d) A trustee under the Trust Act, 1882 is entitled to have charge on the property Section 32 of the Trust Act explains the powers of the trustee to hold and charge on the property.

Floating Charge: A charge may be floating as well as fixed. A fixed charge is a charge on specific property but a floating charge is an equitable charge on assets for time being of a going concern. It is peculiar to companies, which are able to borrow money without any interference with their assets so long as they are going concerns. In other words, it is charge on a class of the assets of the company, present as well as future, the assets of the company are constantly undergoing a change but the creditors will not normally interfere with the assets of the company unless there is breach of some condition. As Professor Gower says, the assets are liquid and the charge is floating. It is ambulatory and shifting in its nature hovering over and so to speak floating with the property which it is intended to effect. As it does not attach to any specific property, it remains dormant until it crystalises.

A floating charge has the following characteristics:

(1) It is a charge on class of assets both present and future.

(2) The class of assets charged is one, which in the ordinary course of business would be changing from time to time.

(3) It is contemplated by the charge that until some future step is taken by those who are interested in the charge the company may carry on its business in the ordinary way, i.e. it may use its assets charged in the ordinary course of its business. (Per Romar L.J. in *Reyork Shive Wool Combers Associated Limited* (1903) 2 Ch. 284. A floating charge is created by debentures on the company's undertaking or its estate, property and effects. It is not necessary that the charge should be on all company's assets. Thus a mortgage of a cinema and of the chattels used in the cinema premises was held to be a floating charge as to the chattles. *National Provisional Bank of England Limited vs. Charteb Electric Theatres*

Limited (1916) Ch. 132. Similarly, a floating charge was created by a mortgage, of, book and other debts, which shall become due during the continuance of this security (*Reyork Shive Wool Combers Association* Supra).

Crystallisation of Floating Charge: A floating charge becomes fixed or cystallises in the following cases:

(1) When the money becomes payable under a condition in the debenture and the debenture holder, (i.e. the creditor) takes some steps to enforce the security;

(2) When the company ceases to carry on business; and

(3) When the company is being wound-up.

Distinction between Mortgage and Charge: Although, in a charge the property is made a security for the payment of the loan, yet the transaction does not amount to mortgage. It is important, therefore to distinguish between a charge and mortgage. Following are the notable points of distinction between the two.

(a) A mortgage is transfer of an interest in the property made by the mortgagor as a security for the loan, while the charge is not the transfer of any interest in the property though it is security for the payment of an amount.

(b) A charge may be created by act of parties or by operation of law. A mortgage can only be created by act of parties.

(c) A mortgage deed must be registered and attested by two witnesses, while a charge need not be made in writing, and if reduced to writing, it need not be attested or registered.

(d) In certain types of mortgage (viz. Mortgage by conditional sale and anomalous mortgage) the mortgagor can foreclose the mortgaged property but in charge, the charge holder cannot foreclose though he can get the property sold as in a simple mortgage.

(e) From the very nature of it, a charge, as a general rule, cannot be enforced against a transferee for consideration without notice. But, in a mortgage the transferee of mortgaged property from the mortgagor, can only acquire the remaining interest of the mortgagor, and is therefore only, bound by the mortgage.

(f) In a charge created by act of parties the specification of the particular fund or property negatives a personal liability and the remedy of the charge holder is against the property only. In a mortgage, there can be security as well as personal liability. In fact, the absence of a personal liability is the principal test that distinguishes a charge from a simple mortgage.

Questions and how to answer

Q. Define Mortgage and explain different kinds of mortgage (Direct question).

Once a mortgage, always a mortgage and nothing but a mortgage.

Ans. This statement refers to 'Mortgagor's Right of Redemption or Doctrine of Equitable Redemption', as explained under Section 60 of the T.P.Act, 1882.

Write now, meaning and definition of Mortgage in brief and then Mortgagor's Right of Redemption.

Further, questions may be asked on Marshalling, Contribution, Subrogation, Charge etc.

LECTURE XIII

LEASE OF IMMOVABLE PROPERTY

[Chapter V : Sections 105-117]

Chapter V containing Sections 105 to 117 of the Transfer of Property Act, 1882 lay down the provisions relating to 'Lease of Immovable Property'. Section 105 defines the terms lease, lessor, lessee, premium and rent. Section 106 lays down the rule relating to duration of certain leases in the absence of written contract or local usage. Section 107 provides for the modes by which leases may be effected or leases how made. Section 108 deals with the rights and liabilities of lessor or and lessee. Section 109 deals with the right of the lessor's transferee. Section 110 makes provision for exclusion of day on which term commences. In other words, it lays down the rule as to how the period of lease should be compiled. Section 111 provides for various modes by which lease may be determined. Section 112 deals with waiver of forfeiture. It specifies the ways for waiving forfeiture. Section 113 speaks about the waiver of notice to quit. Section 114 relates to relief against forfeiture for non-payment of rent. Section 114.A, inserted by the Amendment Act of 1929 deals with relief against forfeiture in certain other cases. Section 115 deals with the effect of surrender and forfeiture on under leases or sub leases. Section 116 deals with the effect 'holding over'. Finally, Section 117 deals with exemption of leases for agricultural purposes. This lecture covers–

(1) Lease : Meaning, Definition and Elements.

(2) Rights and Liabilities of Lessor and Lessee; and

(3) Determination or Termination of Lease.

1. LEASE : MEANING, DEFINITION AND ELEMENTS.

The expression 'Lease' literally means transfer of right to use or enjoyment of an immovable property for a specific or indefinite period in consideration for some benefit in cash, kind or in service paid or promised to be paid in lumpsum or periodically as per terms and the same is accepted.

'Lease' is a transfer of interest, which is limited and qualified, of an immovable property to another for a specific or indefinite period (in perpetuity) in consideration of price in cash or kind or in service paid or promised and the same is accepted by the latter.

In lease, the transferor is called 'Lessor' and the transferee is called 'Lessee'. The property is called 'Lease hold property'.

A lease is not a mere contract but is a transfer of an interest in immovable property. Section 105 of the Transfer of Property Act defines lease as a transfer of right to enjoy immovable property 'for a certain time' or 'in perpetuity' for consideration. The section recognises also a lease of immovable property in consideration of a share of crops. The fundamental conception of a lease is that it is the separation of the right of possession from ownership.

Definition: Section 105 defines the terms Lease, Lessor, Lessee, Premium and Rent. It runs as follows:

A lease of immovable property is a transfer of a right to enjoy property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

'Lessor', 'Lessee', 'Premium' and 'Rent defined – The transferor is called the lessor, the transferee is called the lessee, the price is called the premium and the money, share, service or other thing to be so rendered is called the rent.

Essential Elements: To constitute lease (Lease to be valid) the following essentials/requisites are to be satisfied:

(1) Competence of parties;
(2) Subject matter must be an immovable property;
(3) Duration or terms of lease;
(4) Transfer of right to enjoy;
(5) Consideration; and
(6) Registration.

1. Competence of parties: The parties to lease viz. Lessor and Lessee must be competent to contract (i.e. within the meaning of Section 11 of the Indian Contract Act, 1872). Further the lessor must have a title or authority to transfer.

2. Subject Matter: The subject matter of lease must be an immovable property. It includes land, buildings/houses, mines, benefits to arise out of land such as fisheries, ferries etc.

3. Duration or Term of Lease: The lease may be made for a specific or an indefinite period. It is to be decided/determined by the parties to the lease at the time of entering into lease deed.

4. Transfer of right to enjoy: A lease involves a transfer of an interest in land or right to enjoy. (The interest transferred under lease is limited, not absolute).

5. Consideration: Consideration means 'something in return'. In lease, the consideration may be in form of cash, kind or service; paid or promised. There can be no lease without consideration.

6. Registration (Section 107): Registration of Lease is necessary. It is effected on the basis of the term of lease, not on the basis of the amount. For this purpose, lease may be categorised under two heads:

(1) Leases from year to year; exceeding one year; permanent leases which must be effected by registered document.

(2) The other leases i.e. renewable from month to month or less than one year may be made either by registered document or by mere delivery of possession.

Distinction between License and Lease: Section 105 of the T.P.Act defines lease, while Section 52 of the Easements, 1882 defines license. Both lease and license are the rights over an immovable property of others.

In ***B.M.Lall vs. Dunlop Rubber Co.*** **(1968) 1 SCR 23 at p.27; AIR 1968 SC 175 at p.177** – the distinction between the two concepts was brought out:

'A lease.....is the transfer of a right to enjoy the premises; whereas a license is privilege to do something on the premises which otherwise would be unlawful.... The transaction is a lease, if it grants an interest in the land; it is a license if it gives a personal privilege with no interest in the land.....'

Following are the notable points of distinction between the two:

	Lease		License
1.	Lease creates an interest in the property.	1.	License does not pass an interest in the property.
2.	Lease confers a right on transferee (Lessee) for a fixed period or period in perpetuity.	2.	License does not confer any such right but makes an unlawful act lawful.
3.	Lease is transferable.	3.	License is not transferable.
4.	Lessee can bring a suit in his own name.	4.	Licensee cannot bring a suit in his own name.
5.	It requires registration.	5.	It does not require registration.
6.	It is heritable.	6.	It is not heritable.
7.	It is right in rem.	7.	It is a right in personam.

2. RIGHTS AND LIABILITIES OF LESSOR AND LESSEE [Section 108]

Section 108 of the Transfer of Property Act, 1882 lays down the provisions relating to the Rights and Liabilities of the Lessor and Lessee. It runs as follows:

(A) Rights and Liabilities of the Lessor

(a) The Lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use,

of which the former is and the latter is not aware, and which the latter could not with ordinary case discover.

(b) The Lessor is bound on the lessee's request to put him in possession of the property.

(c) The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(B) Rights and Liabilities of the Lessee

(d) If during the continuance of the lease any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force), shall be deemed to be comprised in the lease.

(e) If by fire, tempest or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let, the lease shall, at the option of the lessee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision.

(f) If the lessor neglects to make, within a reasonable time after notice, any repairs, which he is, bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor.

(g) If the lessor neglects to make any payment which he is bound to make, and which, if not made by him, is recoverable from the lessee or against the property, the lessee may make such payment himself, and deduct it with interest from the rent, or otherwise recover it from the lessor.

(h) The lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth; provided he leaves the property in the state in which he received it.

(i) When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representative is entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them.

(j) The lessee may transfer absolutely or by way of mortgage or sub lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease.

Nothing in this clause shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

(k) The lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest, which the lessee is about to take, of which the lessee is, and the lessor is not, aware, and which materially increase the value of such interest.

(l) The lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf.

(m) The lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within three months after such notice has been given or left.

(n) If the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with, the lessor's rights concerning such property, he is bound to give, with reasonable diligence, notice thereof to the lessor.

(o) The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own; but he must not use, or permit another to use, the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damage buildings belonging to the lessor, or work mines or quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.

(p) He must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes.

(q) On the determination of the lease, the lessee is bound to put the lessor into possession of the property.

Section 108 lays down the rights and liabilities of the lessor and the lessee. But these rights and liabilities are not absolute. They are subject to a contract or local usage to the contrary but not subject to any local law.

Lessor's Rights and Liabilities:

(1) Lessor must disclose to the lessee any defect in the property, which may hinder the intended use of the property.

(2) Lessor must put the lessee in possession of the property.

(3) The lessee must be allowed to remain in peaceful possession of the property if he pays rent and performs his part of the contract of lease.

If the lessee transfers the property or the property vests in some other person, such other person will be entitled to the benefits of the contract.

Lessee's Rights and Liabilities:

(1) If there is accession to the property say by alluvion, then subject to the law relating to alluvion, the lease shall be deemed to relate to this additional property also.

(2) If the property is wholly destroyed or rendered substantially and permanently unfit for the purpose for which it was let by:

(i) fire;

(ii) tempest;

(iii) flood;

(iv) violence of army or mob;

(v) other irresistible force then at the option of lessee the lease shall be void.

(3) If the property needs repairs, then the lessee shall give notice to the lessor to get the repairs done within a reasonable time. If he fails to do so the lessee may get the repairs done and realise the expense not interest from the lessor by adjusting it from rent or otherwise.

(4) If the lessor fails to make any payment in respect of the property, which he is bound to make, the lessee may make the payment and realise the same with interest from the lessor.

(5) The lessee is entitled to remove all articles, which he attached to the earth after determination of lease while he is in possession provided he leaves the property in the state in which he received it.

(6) When the period of lease is not fixed, and the lease is determined by any means not being the fault of the lessee, he or his legal representative is entitled to all crops planted or sown by the lessee and growing upon the property when lease determines and free ingress and egress on the property.

(7) Lessee is given right to transfer the property absolutely or by way of mortgage or sub lease the whole or any part of his interest in the property and similarly such transferee may transfer the property. The lessee shall, however, continue to own his liabilities under the lease.

The exceptions to the rule are–

(a) If the tenant has untransferable right of occupancy.

(b) If he is in default of revenue in respect of the estate.

(8) The lessee must disclose to the lessor any interest in the property, which he knows, and the lessor does not know and which increases the value of the property.

(9) The lessee must pay or tender rent premium to the lessor or his agent. When the lease ends, the lessee may restore to the lessor the property in such condition as and when the lease was

taken subject to natural wear and tear, or irresistible force. He must also allow the lessor to visit the property and inspect the same at reasonable times. If the property has been damaged by the lessee or his agent, or servant he has to make good the defect within three months after notice by the lessor.

(10) If the lessee becomes aware of any proceedings to recover the property or any part thereof or any encroachment on the property he must inform the lessor.

(11) Lessee is entitled to use the products of the property as his own, but he must not use nor permit another to use the property for any purpose other than that for which it was let out to him. He cannot:

(a) fell or sell timber;

(b) pull down or damage building;

(c) work mines or quarries; and

(d) do any other act which may damage the property.

(12) The lessee must not raise any permanent structure on the property except for agricultural purposes.

(13) The lessee must put lessor in possession of the property as determination of lease.

3. DETERMINATION OR TERMINATION OF LEASE [Section 111]

Section 111 of the T.P.Act provides for the termination of lease under different circumstances. It runs as follows:

A lease of immovable property determines–

(a) by efflux of the time limited thereby;

(b) where such time is limited conditionally on the happening of some event – by the happening of such event;

(c) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to,

the happening of any event – by the happening of such event;

(d) in case the interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right;

(e) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them;

(f) by implied surrender;

(g) by forfeiture; that is to say –

1. in case the lessee breaks an express condition which provides that, on breach thereof, the lessor may re enter; or
2. in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; or
3. the lessee is adjudicated an insolvent and the lease provides that the lessor may re enter on the happening of such event;

and in any of these cases the lessor or his transferee gives notice in writing to the lessee of his intention to determine the lease.

(h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

Illustration to Clause (f): A lessee accepts from his lessor a new lease of the property leased, to take effect during the continuance of the existing lease. This is an implied surrender of the former lease, and such lease determines thereupon.

This section is not applicable to agricultural leases as contained in Section 117 of the Act. Following are the circumstances under which a lease can be terminated:

1. By Efflux of the time (Expiry of Time) [Section 111(a)].
2. By happening of an event [Section 111(b)].
3. By termination of Lessor's Interest [Section 111(c)].
4. By Merger [Section 111(d)].
5. By express surrender [Section 111(e)].
6. By implied surrender [Section 111(f)]; and
7. By forfeiture [Section 111(g)].

1. By Efflux of the Time (Expiry of Time) [Section 111(a)]: A lease may be created for a specific period. On expiry of the period, the lease is terminated without any formality. No notice need be served from either side.

2. By happening of an event [Section 111(b)]: If the term of lease is subject to the condition of happening of an event, the lease is terminated upon the happening of such event (It is to be noted that leasehold interest is transferable and heritable).

3. By Termination of Lessor's Interest [Section 111(c)]: Lease is effective so long as the lessor is having interest/right/ authority over the property. When his authority/ interest over it is terminated, the lease also stands terminated automatically.

4. By merger [Section 111(d)]: Merger means uniting together. Where the rights/ interests of both lessor and lessee are vested in the same person, it amounts to merger. Merger terminates lease since the same person cannot be both lessor and lessee.

5. By express surrender [Section 111(e)]: Lessee, with the consent of lessor may surrender or yield up his interest in lease to the lessor. Such surrender to Lessor by Lessee terminates the lease.

6. By implied surrender [Section 111(f)]: Surrender of leasehold property may be inferred from the act of parties. When a lessee accepts from his lessor a new lease of the leased property during the continuance of existing lease, it is an implied surrender of the former lease, which amounts to termination.

7. By forfeiture [Section 111(g)]: Lease stands terminated by forfeiture in the following cases.

(1) **Breach of condition:** Lessor can re enter the property if the Lessee commits breach of condition.

(2) **Denial of landlord (Lessor's) title:** If the lessee denies the title of lessor, sets up the same in himself or in third person, such conduct is sufficient to forfeit the lease.

(3) **Insolvency of the lessee:** It is a good ground for forfeiture of lease.

Questions and how to answer

Q. Define lease and explain various modes for determination of lease? (Direct question).

Q. What are the rights and liabilities of lessor and lessee? (Direct question)

LECTURE XIV

EXCHANGE

[Sections 118-121]

Chapter VI containing Sections 118 to 121 of the Transfer of Property Act, 1882 lays down the provisions relating to exchange of properties. The subject matter of exchange is both immovable and movable. In other words, exchange under Section 118 is not limited/confined to immovable property, but it also extends to barter of goods.

Section 118 defines exchange. Section 119 deals with right of party deprived of thing received in exchange. Section 120 deals with rights and liabilities of parties in exchange of their properties. Finally Section 121 deals with exchange of money.

Meaning: Like sale, exchange is transfer of absolute interest in property, immovable or movable, by which ownership is passed from one person to another. The main difference between sale and exchange is the nature of consideration for the transfer. In sale, the consideration is price, whereas in case of exchange the consideration is property in exchange for some other property.

E.g.: A transfers his property X worth Rs.5000 to B. B in return of this property transfers his property worth Rs.4000 and also gives Rs.1000 in cash to A. This is a case of exchange.

Definition: Section 118 defines exchange. The definition of exchange as given in this section is founded on Section 309 of the New York Civil Code. This definition covers the cases of exchange in respect of both moveable and immovable property. Section 118 runs as follows:

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange'.

A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale.

Essentials: To constitute exchange, the following conditions are to be satisfied.

(1) Two persons mutually transfer.

(2) Ownership of one thing for the ownership of another thing.

(3) Things given and taken may be either things only or money only.

(4) The procedure of sale should be followed for the completion of the transaction.

Mode of Exchange: The second paragraph of Section 118 prescribes the mode in which a transfer of property in completion of an exchange can be effected, namely, the manner provided for the transfer of such property by sale.

Where the exchange is of movable things mere delivery is enough to complete the transfer. Where it is immovable properties or where one of the items is immovable, and the value of any of such properties is Rs.100 or more the provisions of Section 54 will be applicable and the transfer will be completed only by a registered instrument. Where both properties are immovable, exchange is usually effected by mutual conveyances, but it is not necessary that there should be two separate deeds.

Distinction between Sale and Exchange

Sale	Exchange
1. It refers to immovable property only. The subject matter of sale is transfer of absolute interest in an immovable property.	1. It refers to both immovable and movable properties.

Sale	Exchange
2. The consideration in sale is price, paid or promised, partly paid and partly promised.	2. The consideration for transfer of one property is in exchange for another property.
3. The seller or vendor exercises lien on the property if the price remains unpaid in full or in part. (Vendor's lien).	3. There is no such lien in case of exchange.

Right of party deprived of thing received in exchange (Section 119): If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration.

Rights and Liabilities of the Parties to an Exchange (Section 120): Some rights and liabilities are enumerated to the parties to an exchange. Every party to an exchange acts in dual capacity i.e. seller as well as buyer. He is a seller as to that which he gives and he is a buyer as to that which he receives. So every person can enjoy rights recognised to the seller as well as buyer. The rights and responsibilities recognised to seller as well as the buyer under Section 55 of the T.P.Act are applicable to the parties to an exchange excepting the right of unpaid vendor's lien.

Exchange of Money (Section 121): On exchange of money, each party thereby warrants the genuineness of money given by him.

E.g.: Where A gives a currency note of Rs.100 to B and B in exchange gives Rs.100 in coins. A guarantees that the note is genuine and B guarantees that every one of the coin he has handed over is genuine.

This section is based on the principle that payment of spurious money is no payment at all. It applies only to spurious money and not money depreciated by use or wear.

LECTURE XV

GIFT OF PROPERTY

[Sections 122-129]

Chapter VII containing Sections 122 to 129 lays down the provisions relating to 'Gift of Property'. It refers to both immovable and movable properties. In other words, the subject matter is transfer of absolute interest in the property, immovable or movable. The notable point is there is no consideration for the transfer and the gift of a property is not valid and enforceable unless it is accepted by the donee (transferee). This lecture covers –

1. Gift : Meaning, Definition and Essentials; and
2. Kinds of Gift.

1. GIFT : MEANING, DEFINITION AND ESSENTIALS

Meaning: When a person transfers some property, movable or immovable to another voluntarily without consideration and the same is accepted, it is called Gift.

It is a voluntary transfer of an absolute interest in the property, movable or immovable, without any consideration to another, and the same is accepted by the latter.

Definition (Section 122): Section 122 of the T.P.Act defines 'Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person to another and accepted by or on behalf of the latter (donee).

The person who transfers the property is called 'Donor' and the person to whom it is transferred is called 'Donee'. It is very essential that the acceptance of the gift shall take place during the lifetime of the donee. Otherwise, it becomes void.

Essentials of Gift: To constitute gift (Gift, to be valid), the following conditions are to be satisfied:

(1) There must be a transfer of certain existing property, movable or immovable.

(2) It must have been made voluntarily without any consideration.

(3) There should be a donor capable of transferring and the acceptance must be made by or on behalf of the donee during his/her lifetime.

(4) If the subject of Gift is an immovable property; it must be made by a registered instrument duly attested.

1. Transfer of an existing property: To constitute gift, there must be a transfer of certain property, which is in existence at the time of making the gift. There may be a condition precedent to Gift. But such condition should not be repugnant or contrary to the provisions of the Act.

2. Voluntarily and without consideration: The most essential ingredients of Gift is that the transfer must be made without consideration. It is no gift if there is any consideration. While the expression 'Voluntarily' signifies free consent. (Section 14, I.C.Act, 1872) i.e. consent given to make gift without employing coercion, undue influence, fraud etc. (Sections 15 to 20, I.C.Act, 1872).

3. Donor and Donee: Donor means a person, who gives. Donee is a person, who accepts the gift. Any person, who is sui juris, can make a gift of his property. In other words, the person making the gift is called Donor and the person accepting the gift is called Donee. Both parties must be alive at the time of making the gift. The donor must be capable of making the gift. The Donor must be capable of making the gift, while the donee must be alive at the time of acceptance.

4. Registration and attestation: If the subject matter of gift is an immovable property, the transfer must be made by a registered instrument duly attested by two witnesses.

Gift how made and effected (Section 123): Section 123 of the Act deals with the mode of making gift. For making gift of an immovable property, the transfer must be effected by a registered instrument signed by two witnesses. With regard to the gift of movable property, registration is not compulsory but optional. It may be effected by mere delivery. Section 123 runs as follows:

For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Effect of Registration of Gift: As stated above, registration is compulsory in case of making gift of an immovable property and it is optional in case of movable property. Now the question is whether non-registration (of immovable property) renders the gift ineffective? Following case law would answer this question.

Kalyanasundaram Pillai vs. Karuppa Moopanar, 50 Mad. 193 PC 1927 PC 42 – In this case, it was held that, when the instrument of gift has been handed over by the donor to the donee, and accepted by him, the former (donor) has done every thing in his power to complete the donation and to make it effective. It was held that registration of deed is not a strict rule, but a formality. In simple words, it was held in this case that, registration of gift is not compulsory but optional.

This view was also expressed in the case of:

Venkatarama Reddy vs. Pillati Rama Reddy, 40 Mad. F.B. 204 – It was held that gift becomes effective after execution of the document. It can be registered subsequently even after the death of the donee.

Therefore, it is clear from the above, that registration of gift is a mere formality.

Suspension & Revocation of Gift (Section 126): The general rule is – gift once completed, cannot be suspended or revoked. However, Section 126 of the T.P.Act provides for the revocation of Gift under the following two circumstances.

(1) In such a case if it were a contract voidable at the option of donor (if gift is made by employing coercion, fraud etc.).

(2) If there is an agreement (between Donor and Donee) to that effect.

Even if the Gift is validly revoked in either of the cases stated above, the donor will not be able to recover the property if it is passed into the hands of a bonafide transferee for consideration without notice.

2. KINDS OF GIFT

Gifts may be classified/categorised under the following heads.

1. Void Gifts (Sections 6, 122 and 124 to 127).
2. Onerous Gifts (Section 127).
3. Universal Donee (Section 128); and
4. Donatio Mortis Causa (Death Bed Gift).

1. Void Gifts: The following gifts are declared void:

(a) Gift made for an unlawful purpose (Section 6).

(b) Gift subject to condition, and the fulfillment of which is impossible (Section 6), then it becomes void.

(c) If Donee dies before acceptance (Section 122), it becomes void.

(d) Gift by a person incompetent to contract viz. Minor, lunatic etc. (Section 7) is void. (Section 11 of the Indian Contract Act 1872).

2. Onerous Gifts (Section 127): Section 127 deals with 'Onerous Gifts'. It reads as follows:

Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Onerous gift to disqualified person: A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Illustrations:

(a) A has shares in X, a prosperous joint stock company and also shares in Y, a joint stock company, in difficulties. Heavy calls are expected in respect of the shares in Y. A gives B all his shares in joint stock companies. B refuses to accept the shares in Y. He cannot take the shares in X.

(b) A, having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to B the lease, and also, as a separate and independent transaction, a sum of money. B refuses to accept the lease. He does not by this refusal forfeit the money.

Section 127 of the T.P.Act deals with 'Onerous Gifts'. Onerous Gift is one, which carries not only benefit but also an obligation/burden to the donee.

A gift always may not be beneficial in character. It may also create an obligation/ burden to the donee. For instance 'A' has

shares in Company 'X' which is prosperous and also in Company 'Y', which is in crisis (difficulties). Dividend is expected from the former, while heavy calls (call in arrear) from the latter. If 'A' wants to give in gift to 'B' the shares of both companies 'X' & 'Y', it is called 'Onerous Gift'. 'B' (donee) has to accept both or refuse the both. But, he ('B') cannot accept only the shares of 'X' company.

Underlying Principle: Section 127 (onerous Gift) is based on the maxim 'qui sensit commodum debt et sentire enus'. It means "he who receives the advantage must bear or suffer the burden also".

If the gift is in the form of two transfers, one is beneficial and the other is obligatory, the donee can accept the former and refuse the latter.

Onerous Gift to disqualified person (Section 127): A person incompetent to contract is said to be disqualified person. Such person may be a donee for Onerous Gift. But he cannot have obligation against himself i.e. he is not liable for burden. However, he is liable when the disqualification is removed. (**E.g.**: Minor becomes liable on attaining majority).

3. Universal Donee (Section 128): Section 128 speaks about Universal Donee. It runs as follows:

Subject to the provisions of Section 127 where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

A Universal Donee is one whom all the properties of donor have been given and is liable for all the debts and liabilities of the donor at the time of the gift.

The property comprises of must be both movable and immovable. If it is only immovable, he is not a Universal Donee (as laid down in *Anuradha vs. Lakshmi*).

4. Donatio Mortis Causa (Death Bed Gift): When a gift is made by a donor, when he was in critical condition, likely to cause his death, it is called 'Donatio Mortis Causa'. It means donation made out of death, and hence it is called 'Death Bed Gift'.

T.P.Act deals with this concept (Donatio Mortis Causa) in respect of immovable property only. (Section 191 of Indian Succession Act deals with this concept with regard to movable property).

It is to be noted that Death Bed Gift is valid only when the donor dies. It has no effect before the death of the donor.

Questions and how to answer

Q. Define Gift and what are the various kinds of gifts? (Direct Question).

Further, short questions may be asked on Onerous Gift, Death bed gift and Universal Donee.

LECTURE XVI

ACTIONABLE CLAIMS

[Sections 130-137]

Chapter VIII containing Sections 130 to 137 of the Transfer of Property Act, 1882 lays down the provisions relating to 'Actionable Claims'. Section 130 deals with transfer of actionable claims. Section 130.A, which dealt with transfer of policy of marine insurance was repealed with the passing of the Marine Insurance Act, 1963. Section 131 deals with notice in respect of the transfer of actionable claim. Section 132 imposes liability on transferee of actionable claim. Section 133 deals with warranty of solvency of debtor. Section 134 deals with mortgaged debt. Section 135 deals with assignment of rights under policy of insurance against fire. Section 135.A, which dealt with assignment of rights under policy of marine insurance was repealed with the passing of the Marine Insurance Act, 1963. Section 136 speaks about incapacity of officers connected with Courts of Justice. Finally Section 137 deals with saving of negotiable instruments etc.

Actionable Claim : Meaning & Definition:

Meaning: Actionable claim is an act or claim for which an action can be instituted in civil court for realisation of the benefit. It means

(i) any unsecured debt; or

(ii) any interest in movable property, not in possession of the claimant.

An actionable claim is a claim to take legal action for realisation of the benefit. In England, it is called 'chose in action' or 'a thing in action'.

Definition: The definition of actionable claim was defined in the original Act. However, the definition under the original Act was too wide since it covered every act or claim for which an

action would lie in the civil court. The Transfer of Property (Amendment) Act, 1930 has narrowed the definition.

Section 3 of the T.P.Act, 1882 defines 'Actionable Claim to be a claim:

(1) to any debt other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property; or

(2) to any beneficial interest in movables not in possession actual, or constructive of the claimant;

(3) which the civil courts recognise as affording grounds for relief whether such debt or beneficial interest be existent accuring, conditional or contingent.

In brief, an actionable claim means:

(i) any unsecured debt; or

(ii) any interest in immovable property, not in possession of the claimant.

The constituents of the above definition may be explained as follows:

1. Unsecured Debt: The claim under actionable claim may be an unsecured debt (i.e. a debt without security). Debts secured by a mortgage of immovable property or by a pledge of movable property are not actionable claims.

E.g.: 'X' owes 5000 to 'Y' against a promissory note. 'Y's claim is actionable claim.

2. Beneficial Interest in Movable Property: A right to claim benefit in a contract of purchase of goods is a beneficial interest in movable property.

E.g.: 'A' agrees to sell 100 bags of wheat to be delivered on a future date. 'B' has a beneficial interest and is an actionable claim.

Instances of Actionable Claims: Following are some of the instances of actionable claims:

Right to claim benefit under a contract of purchase of goods; Claim under insurance policy, amount standing at the credit of provident fund account; Share in partnership, arrears of rent etc.

Instances of Claims, not actionable: Share in a company, copyright, mortgage debt, right to recover damages for breach of contract etc.

The provisions relating to mode, effect or assignment of actionable claim and the liability of the assignee are provided in Section 130 to 132 of the Act.

Assignment of Actionable Claims: Sections 130 to 132 of the Act deal with assignment of actionable claims. The expression 'assignment' literally means, "transfer". According to Section 130 of the T.P.Act, every actionable claim can be transferred by means of a separate instrument in writing duly stamped and signed by the assignor or his duly authorised agent.

Actionable claim may be assigned by way of sale, mortgage, gift or exchange. Registration is not necessary. It takes effect from the date of assignment.

Section 130 runs as follows:

The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instruments, and thereupon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as it hereinafter provided be given or not.

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or against whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim, shall (save where the debtor or other person is a party to the

transfer or has received express notice thereof as hereinafter provided) be valid as against such transfer.

The transferee of an actionable claim may, upon the execution of such instrument of transfer as aforesaid, sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceeding and without making him a party thereto.

Exception: Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of Section 38 of the Insurance Act, 1938 (4 of 1938).

Illustrations:

(i) A owes money to B, who transfers the debts to C. B then demands the debt from A, who, not having received notice of the transfer, as prescribed in Section 131, pays B. The payment is valid, and C cannot sue A for the debt.

(ii) A effects a policy on his own life with an Insurance Company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of A's executor, subject to the proviso in Sub Section (1) of Section 130 and to the provisions of Section 132.

Notice (Section 131): Notice of assignment should be given to the debtor so as to enable him to pay the creditor after assignment. The assignee in his own interest must give notice to the debtor. Then, the debtor is liable to pay to assignee only. According to Section 131 the notice:

(1) must be in writing;

(2) must contain the name and address of assignee; and

(3) must be signed by assignor or his authorised agent and on refusal; it must be signed by assignee or his agent.

Section 131 runs as follows:

Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this

behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

Liability of transferee of actionable claim (Section 132): The transferee of an actionable claim shall take it subject to all the liabilities and equities and to which the transferor was subject in respect thereof at the date of the transfer.

Illustrations:

(i) A transfers to C a debt due to him by B, A being then indebted to B. C sues B for the debt due by B to A. In such suit B is entitled to set off the debt due by A to him; although C was unaware of it at the date of such transfer.

(ii) A executed a bond in favour of B under circumstances entitling the former to have it delivered up and cancelled. B assigns the bond to C for value and without notice of such circumstances. C cannot enforce the bond against A.

Warranty of solvency of debtor (Section 133): Where the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer, and is limited, where the transfer is made for consideration, to the amount or value of such consideration.

Mortgaged debt (Section 134): Where a debt is transferred for the purpose of securing an existing or future debt, the debt so transferred, if received by the transferor or recovered by the transferee, is applicable, first, in payment of the costs of such recovery; secondly, in or towards satisfaction of the amount for the time being secured by the transfer; and the residue, if any, belongs to the transferor or other person entitled to receive the same.

Assignment of rights under policy of insurance against fire (Section 135): Every assignee by endorsement or other writing, of a policy of insurance against fire, in whom the property in the subject insured shall be absolutely vested at the date of the assignment, shall have transferred and vested in him all rights of

suit as if the contract contained in the policy had been made with himself.

Incapacity of officers connected with Courts of Justice (Section 136): No Judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid.

Section 136 declares certain person as incompetent to take any actionable claim by assignment. This section is a restriction to purchase actionable claim by the lawyers, judges and officers attached to the court. The object of this prohibition is clearly stated by the Privy Council in '*Kerakosa vs. Serle*'.

'It is of great importance that no officer of a court of justice should be even exposed to the suspicion that in the discharge of his official duties, his conduct may be influenced by any personal consideration.'

Saving of negotiable instrument, etc. (Section 137): Nothing in the foregoing sections of this Chapter applies to stocks, shares or debentures, or to instruments which are for the time being, by law or custom, negotiable, or to any mercantile document of title to goods.

Explanation: The expression 'mercantile document of title to goods' includes a bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

APPENDICES

LECTURE XVII

THE INDIAN EASEMENTS ACT, 1882[1]

(Act V of 1882)

An Act to define and amend the Law relating to Easements and Licences.

Preamble— Whereas it is expedient to define and amend the Law relating to Easements and Licences; it is hereby enacted as follows:

Preliminary

1. Short title, local extent and commencement— This Act may be called "The Indian Easements Act, 1882"; it extends to the territories respectively administered by the Governor of Madras-in-Council and the Chief Commissioners of the Central Provinces and Coorg, and it shall come into force on the first day of July, 1882.

State Amendments

Andhra Pradesh: (i) For the words "territories respectively administered by the Governor of Madras in Council and" the following words shall be substituted" whole of the State of Andhra and the territories administered by" — Andhra A.L.O., 1953; Andh. Pradesh. A.L.O., 1957.

(ii) For the words "respectively administered by the Governor of Madras in Council and", the following words shall be substituted" specified in the First Schedule to the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959 (C.A. 56 of 1959) and the territories administerd by" — Andh. Pradesh. A.L.O., 1961.

Himachal Pradesh: Omit 2nd and 3rd paras of S.I. — H.P. A.L.O. 1948 (25-12-1948).

Karnataka: For the entry under the heading "Local Extent" substitute the following:

"It extends to the whole of the State of Karnataka" — Karna. Act. 33 of 1978, S.7 (1-12-1978).

Kerala: For the second paragraph substitute:

"It extends to the whole of the Malabar District" — Kerala A.L.O. 1956.

Madhya Pradesh: For the words beginning with "it extends" and ending with "Coorg" substitute:

"It extends to the territories of Madras, Madhya Pradesh and Coorg" — M.P. A.L.O., 1956 and M.P. Act 23 of 1958, Section 3(1) and Sch. Part A.

Maharashtra: For the words beginning with "It extends" and ending with "Coorg", substitute:

1. This Act extended as whole by Jammu & Kashmir Reorganisation Act, 2019 (34 of 2019), w.e.f. 31-10-2019, vide Noti. No. S.O. 2889(E), dt. 9-8-2019.

"It extends to the territories of Madras, Vidharbha region and Coorg" — Bom. A.L.O., 1956.

Tamil Nadu: (i) For the words "Governor of Madras" substitute the words "Governor of Tamil Nadu" — Tamil Nadu A.L.O. 1970 (w.e.f. 14-1-1969).

(ii) In the territories added by Act 56 of 1959, for the words "whole of the State of Andhra and the territories administered by", substitute the words "territories respectively administered by the Governor of Madras in Council and" — Madras (Addl. Terr.) A.L.O. 1961.

2. Savings— Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from:

(a) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation.

(b) any customary or other right (not being a licence) in or over immovable property which the Government the public or any person may possess irrespective of other immovable property; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

3. Construction of certain references to Act XV of 1877 and Act IX of 1871— All references in any Act or Regulation to Sections 26 and 27 of the Indian Limitation Act, 1877 or to Sections 27 and 28 of Act No. IX of 1871 shall, in the territories to which this Act extends, be read as made to Sections 15 and 16 of this Act.

Chapter I

Of Easements Generally

4. "Easement" defined— An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.

Dominant and Servient heritages and owners: The land for the beneficial enjoyment of which the right exists is called the dominant heritage

and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage and the owner or occupier thereof the servient owner.

Explanation: In the first and second clauses of this section the expression "land" includes also things permanently attached to the earth; the "expression beneficial enjoyment" includes also possible convenience, remote advantage and even a mere amenity; and the expression "to do something" includes removal and appropriation by the dominant owner; for the beneficial enjoyment of the dominant heritage of any part of the soil of the servient heritage or anything growing or subsisting thereon.

Illustrations

(a) A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.

(b) A, as the owner of a certain house, has the right to go on his neighbour B's land and to take water for the purposes of his house-hold out of a spring therein. This is an easement.

(c) A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.

(d) A, as the owner of a certain house and farm, has right to graze a certain number of his own cattle on B's field, or to take for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.

(e) A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and repassing. This right is not an easement.

(f) A is bound to cleanse a water course running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.

5. Continuous and discontinuous, apparent and non-apparent easements— Easements are either continuous or discontinuous, apparent or non-apparent.

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.

A non-apparent easement is one that has no such signs.

Illustrations

(a) A right annexed to B's House to receive light by the windows without obstruction by his neighbour 'A'.

This is a continuous easement.

(b) A right of way annexed to A's house over B's land. This is a discontinuous easement.

(c) Rights annexed to A's land to lead water, thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

(d) A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.

6. Easement for limited time or on condition— An easement may be permanent or for a term of years or other limited period, or subject to periodical interruption or exercisable only at a certain place, or at certain times, or between certain hours or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.

7. Easements restrictive of certain rights— Easements are restrictions of one or other of the following rights, namely:

(a) Exclusive right to enjoy — The exclusive right of every owner of immovable property (subject of any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto;

(b) Rights to advantages arising from situation — The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the rights above referred to

(a) The exclusive right of every owner of land in a town to build on such land, subject to any Municipal law for the time being in force;

(b) The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.

(c) The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.

(d) The right of every owner of land to so much light and air as pass vertically thereto.

(e) The right of every owner of land that such land in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

Explanation: Land is in its natural condition when it is not excavated and not subjected to artificial pressure and the "subjacent and adjacent and soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

(f) The right of every owner of land that, within his own limits, the water which naturally passes or percolates by over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.

(g) The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel, and all water on its surface which does not pass in a defined channel.

(h) The right of every owner of land that the water of every natural stream which passes by, through or over his land, in a defined natural channel, shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.

(i) The right of every owner of upper land that water naturally rising in or falling on such land and not passing in a defined channel, shall be allowed by the owner of adjacent lower land to run naturally thereto.

(j) The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon: Provided that he does not thereby cause material injury to other like owners.

Explanation: A natural stream is a stream whether permanent or intermittent, tidal or tideless on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.

Chapter-II

The Imposition, Acquisition and Transfer of Easements

8. Who may impose easements— An easement may be imposed by any one in the circumstances and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

Illustrations

(a) A is a tenant of B's land under a lease for an unexpired term of twenty years and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.

(b) A is a tenant for his life of certain land with remainder to B absolutely. A cannot unless with B's consent impose an easement thereon which will continue after the determination of his life interest.

(c) A, B and C are. co-owners of certain land. A cannot, without the consent of B and C impose an easement on the land or, or on any part thereof.

(d) A and B are lessees of the same lessor. A of a field X for a term of five years and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X in favour of B. a right of way terminable with A's lease.

9. Servient owners— Subject to the provisions of Sec. 8 a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.

Illustrations

(a) A has in respect of his mill, a right to the uninterrupted flow thereto from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset: Provided that A's supply is not thereby diminished.

(b) A has, in respect of his house a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: Provided that A's right of way is not thereby obstructed.

10. Lessor and mortgagor— Subject to the provisions of Section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such and a mortgagor may

impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.

Explanation: A security is insufficient within the meaning of this Section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings exceeds by one half, the amount for the time being due on the mortgage.

11. Lessee— No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.

12. Who may acquire easements— An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

13. Easements of necessity and Quasi Easements— Where one person transfers or bequeaths immovable property to another:

(a) If an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor

or testator the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator, shall unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons:

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement; or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in this Section, clauses (a) (c) and (e) are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively the transferor and transferee.

Illustrations

(a) A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only over A's adjoining land to the field sold.

(b) A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A is entitled to a right of way for agricultural purposes only, over B's field to the field retained.

(c) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.

(d) A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land

to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burden to which it was subject in A's hands.

(e) A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light and C takes the land subject to the restriction that he may not build so as to obstruct, such light.

(f) A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.

(g) A, the owner of the house, sells B a factory built on adjoining land. B is entitled as against A, to pollute the air, when necessary, with smoke and vapours from the factory.

(h) A, the owner of two adjoining houses, Y and Z, sells Y to B and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect and A is entitled to the benefit of all the gutters and drains common to the two houses, and necessary for enjoying Z as it was enjoyed when the sale took effect.

(i) A, the owner of two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.

(j) A, the owner of two adjoining buildings, sells one to B, and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support from C's building.

(k) A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.

(l) Under the Land Acquisition Act, 1894, a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(m) Owing to the partition of joint property. A becomes the owner of an upper room in a building and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.

(n) A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right to way over that land suitable to the business to be carried on by B in the house and grounds.

14. Direction of way of necessity— When a right to a way of necessity is created under Section 13, the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.

15. Acquisition by prescription— Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years.

and where support from one person's land or things affixed thereto, has been peaceably received by another person's land, subjected to artificial pressure, or by things affixed thereto, as an easement, without interruption and for twenty years;

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption and for twenty years, the right to such access and use of light or air. support or other easement shall be absolute.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation I: Nothing is an enjoyment within the meaning of this Section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or, if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.

Explanation II: Nothing is an interruption within the meaning of this section unless where there is an actual cessation of the enjoyment by reason of an obstruction, by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year

after the claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III: Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV: In the case of an easement to pollute water the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.

When the property over which a right is claimed under this section belongs to the Government, this section shall be read as if, for the words 'twenty years' the words "thirty years" were substituted.

Illustrations

(a) A suit is brought in 1883 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January, 1862 to 1st January, 1882. The plaintiff is entitled to easement.

(b) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed, "as an easement" for twenty years.

(c) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.

16. Exclusion in favour of reversioner of servient heritage— Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.

Illustration

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty five years, but B shows that during ten of these years C had a life interest in the land, that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to provisions of this section, has only proved enjoyment for fifteen years.

17. Rights which cannot be acquired by prescription— Easements acquired under Sec. 15 are said to be acquired by prescription and are called prescriptive rights.

None of the following rights can be so acquired:

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

(b) a right to the free passage of light or air to an open space of ground;

(c) a right to surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise;

(d) a right to underground water not passing in a defined channel

18. Customary easements— An easement may be acquired in virtue of a local custom. Such easements are called customary easements.

Illustrations

(a) By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A, having become the tenant of a plot of uncultivated land in the village, breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.

(b) By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation and B acquires a like easement with respect of A's house.

19. Transfer of dominant heritage passes easement— Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention

appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

Illustration

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representatives so long as the lease continues.

Chapter-III

The Incidents of Easements

20. Rules controlled by contract or title— The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements: And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

21. Bar to use unconnected with enjoyment:— An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.

Illustrations

(a) A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.

(b) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers, for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

22. Exercise of Easement—Confinement of exercise of easement— The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Illustrations

(a) A has a right of way over B's field. A must enter the way at either end and not at any intermediate point.

(b) A has a right annexed to his house to cut thatching grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.

23. Right to alter mode of enjoyment— Subject to the provisions of Sec.22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

Exception: The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

Illustrations

(a) A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw mill into a corn-mill, provided that it can be worked by the same amount of water.

(b) A has a right to discharge on B's land the rain water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.

(c) A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature of the pollution.

(d) A, riparian owner, acquires as against the lower riparian owners, a prescriptive right to pollute a stream by throwing saw dust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

24. Right to do acts to secure enjoyment— The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause to the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.

Accessory rights: Rights to do acts necessary to secure the full enjoyment of an easement are called "accessory rights".

Illustrations

(a) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(b) A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(c) A, as owner of certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.

(d) A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(e) A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.

(f) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(g) A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.

25. Liability for expenses necessary for preservation of easement— The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use of preservation of an easement, must be defrayed by the dominant owner.

26. Liability for damage for want of repair— Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

27. Servient owner not bound to do anything— The servient owner is not bound to do anything for the benefit of the dominant heritage and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement, but he must not do any act tending to restrict the easement or to render its exercise less convenient.

Illustrations

(a) A, as owner of a house has a right to lead water and send sewage through B's land. B is not bound as servient owner, to clear the water - course or scour the sewer.

(b) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound, as servient owner, to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) A, in respect of his mill, is entitled to a water-course through B's land. B must not drive stakes so as to obstruct the water course.

(e) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

28. Extent of easements— With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect:

Easement of necessity: An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.

Other easements: The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties and the purpose for which the rights were imposed or acquired.

In the absence of evidence as to such intention and purpose:

(a) Right of Way: A right of way of any one kind does not include a right of way of any other kind;

(b) Right to light or air acquired by grant: The extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made.

(c) Prescriptive right to light or air: The extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which had been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used;

(d) Prescriptive right to pollute Air and Water: The extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose; and

(e) Other Prescriptive Rights: The extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.

29. Increase of easement— The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and, if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations

(a) A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

(b) A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.

(c) A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

30. Partition of dominant heritage— Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden on the servient heritage: Provided that such annexation is consistent with the terms of the instrument, decree or revenue proceedings (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations

(a) A house to which a right of way by a particular path is annexed, is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.

(b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, and other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c) A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.

31. Obstruction in case of excessive user— In the case of excessive user of an easement the servient owner may without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage: Provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration

A, having a right to the free passage over B's land of light to four windows, six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.

Chapter IV

The Disturbance of Easements

32. Right to enjoyment without disturbance— The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.

Illustration

A, as owner of a house, has a right of way over B's land. C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

33. Suit for disturbance of Easement— The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto: Provided that the disturbance has actually caused substantial damage to the plaintiff.

Explanation 1: The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and Section 34.

Explanation II: Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.

Explanation III: Where the easement disturbed is a right to the free passage of air to the openings in a house, damage is substantial within the meaning of this Section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.

Illustrations

(a) A places a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.

(b) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot passengers using the way. This is not substantial damage to A.

34. When cause of action arises for removal of support— The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation unless and until substantial damage is actually sustained.

35. Injunction to restrain disturbance— Subject to the provisions of the Specific Relief Act. 1877 Sections 52 to 57 (both inclusive) an injunction may be granted to restrain the disturbance of an easement.

(a) If the easement is actually disturbed when compensation for such disturbance might be recovered under this chapter;

(b) If the disturbance is only threatened or intended when the act threatened or intended must necessarily if performed disturb the easement.

36. Abatement of obstruction of easement— Notwithstanding the provisions of Section 24, the dominant owner cannot himself abate a wrongful obstruction of an easement.

Chapter V

The Extinction, Suspension and Revival of Easements

37. Extinction by dissolution of right of servient owner— When, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.

Exception: Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with Section 10.

Illustrations

(a) A transfers Sultanpur to B on condition that he does not marry C. B imposes an easement on Sultanpur. Then B marries C. B's interest in Sultanpur ends, and with it the easement is extinguished.

(b) A, in 1860, let Sultanpur to B for thirty years from the date of lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty nine years. B's interest in Sultanpur then ends and with it C's easement.

(c) A and B tenants of C have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.

(d) A mortgages Sultanpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of Section 10. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.

38. Extinction by release— An easement is extinguished when the dominant owner releases it, expressly or impliedly, to the servient owner:

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.

An easement may be released as to part only of the servient heritage.

Explanation I: An easement is impliedly released:

(a) Where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority;

(b) Where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II: Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations

(a) A, B and C are co-owners of a house to which an easement is annexed. A, without the consent of B and C releases the easement. This release is effectual only as against A and his legal representative.

(b) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(c) A, having the right to discharge his eaves dropping into B's yard, expressly authorises B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(d) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) A, having a projecting roof by means of which he enjoys an easement to discharge eaves droppings on B's land, permanently alters the roof so as to direct the rain water into a different channel and discharge it on C's land. The easement is impliedly released.

39. Extinction by revocation— An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

40. Extinction on expiration of limited period of happening of dissolving condition— An easement is extinguished where it has been imposed for a limited period or acquired on condition that it shall become void on the performance or non-performance of a specific act, and the period expires or the condition is fulfilled.

41. Extinction on termination of necessity— An easement of necessity is extinguished when the necessity comes to an end.

Illustration

A grants B a field inaccessible except by passing over A's adjoining land. B, afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

42. Extinction of useless easement— An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.

43. Extinction by permanent change in dominant heritage— Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished unless:

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it; or

(c) the easement is an easement of necessity;

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.

44. Extinction on permanent alteration of servient heritage by superior force— An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement:

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage; and the provisions of Sec.14 apply to such way.

Illustrations

(a) A grants to B, as the owner of a certain house, a right to fish in a river, running through A's land. The river changes its course permanently and runs through C's land. B's easement is extinguished.

(b) Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.

45. Extinction by destruction of either heritage— An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

Illustration

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

46. Extinction by unity of ownership— An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.

Illustrations

(a) A, as the owner of a house, has a right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.

(b) The dominant owner acquires only part of the servient heritage; the easement is not extinguished, except in the case illustrated in Sec.41.

(c) The servient owner acquires the dominant heritage in connection with a third person: the easement is not extinguished.

(d) The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages: the easements are not extinguished.

(e) the joint owners of the dominant heritage jointly acquire the servient heritage; the easement is extinguished.

(f) A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires only one of the servient heritages. The easement is not extinguished.

(g) A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.

47. Extinction by non-enjoyment— A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.

A discontinuous easement is extinguished when, for a like period, it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner:

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers under the Indian Registration Act, 1877 (3 of 1877) a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place or at other times, or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstances that during the said period, no one was in the possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished under this section:

(a) Where the cessation is in pursuance of a contract between the dominant and servient owners;

(b) Where the dominant heritage is held in co-ownership and one of the co-owners enjoys the easement within the said period; or

(c) Where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.

Illustration

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

48. Extinction of accessory rights— When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.

Illustration

A has an easement to draw water from B's well. As accessory thereto, he has a right of way over B's land to and from the well. The easement to draw water is extinguished under Sec.47. The right of way is also extinguished.

49. Suspension of easement— An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage

for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.

50. Servient owner not entitled to require continuance— The Servient owner has no right to require that an easement be continued; and; notwithstanding the provisions of Sec.26 he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.

Compensation for damage caused by extinguishment or suspension. Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

Illustration

A, in exercise of an easement, diverts to his canal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

51. Revival of easements— An easement extinguished under Sec. 45 revives:

(a) When the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion;

(b) When the destroyed heritage is a servient building and before twenty years have expired such building is re-built upon the same site; and

(c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under Sec.46 revives when the grant or bequest by which the unity of ownership was produced is set-aside by the decree of a competent court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under Sec.47.

Illustration

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

Chapter VI

Licences

52. "Licence" defined— Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a licence.

53. Who may grant Licence— A Licence may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the licence.

54. Grant may be express or implied— The grant of licence may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a licence.

55. Accessory licences annexed by law— All licences necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licences are called accessory licences.

Illustration

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

56. Licence when transferable— Unless a different intention is expressed or necessarily implied a licence to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a licence cannot be transferred by the licensee or exercised by his servants or agents.

Illustrations

(a) A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immovable property of B. The right cannot be transferred.

(b) The Government grants B a licence to erect and use temporary grain sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.

57. Grantor's duty to disclose defects— The grantor of a licence is bound to disclose to the licensee any defect in the property affected by the licence likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not aware.

58. Grantor's duty not to render property unsafe— The grantor of a licence is bound not to do anything likely to render the property affected by the licence dangerous to the person or property of the licensee.

59. Grantor's transferee not bound by licence— When the grantor of the licence transfers the property affected thereby, the transferee is not as such bound by the licence.

60. Licence when revocable— A licence may be revoked by the grantor, unless:

(a) It is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the licence, has executed a work of a permanent character and incurred expenses in the execution.

61. Revocation express or implied— The revocation of a licence may be express or implied.

Illustrations

(a) A, the owner of a field, grants a licence to B to use a path across it. A, with intent to revoke the licence, locks a gate across the path. The licence is revoked.

(b) A, the owner of a field, grants a licence to B to stack hay on the field. A lets or sells the field to C. The licence is revoked.

62. Licence when deemed revoked— A licence is deemed to be revoked:

(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the licence;

(b) When the licensee releases it, expressly or impliedly, to the grantor or his representatives;

(c) When it has been granted for a limited period, or acquired on condition that it shall become void on the performance or

non-performance of a specified act, and the period expires or the condition is fulfilled;

(d) Where the property affected by the licence is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right;

(e) Where the licensee becomes entitled to the absolute ownership of the property affected by the licence;

(f) Where the licence is granted for a specified purpose and the purpose is attained or abandoned, or becomes impracticable;

(g) Where the licence is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist;

(h) Where the licence totally ceases to be used as such for an unbroken period of twenty years and such cessation is not in pursuance of a contract between the grantor and the licensee;

(i) In the case of an accessory licence, when the interest or right to which, it is accessory ceases to exist.

63. Licensee's rights on revocation— Where a licence is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

64. Licensee's rights on eviction— Where a licence has been granted for a consideration and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the licence, the right for which he contracted, he is entitled to recover compensation from the grantor.

LECTURE XVIII

WILL*

A document by which a person intends to distribute his property after his death is called a "Will". The Will comes into force only after the death of the creator of the Will called "Testator" or the Maker.

Who can write a Will?

Any person being a major and of sound mind can write a Will to give away his property to others.

Any person having the transferable right of a property can transfer the property through a Will irrespective of his or her marital status. Deaf/ dumb and blind people also can transfer the property to the others by Will but these people should have the knowledge as to what they are doing. In case of insane person, they can write a Will in lucid intervals, A Will written by a person in a condition of not knowing as to what he is doing, because of ill health or intoxication or for any other reason is not a valid one.

How to write a Will

The Will must fulfil the following conditions. It should be in writing. It should contain the signature of the Testator (maker). It should contain signatures of two witnesses.

Written Will

A Will should be in writing, i.e., it can be typed or printed or should have been written in any other form. Will need not necessarily be written on a paper. It can be written on anything. In some of the western countries Wills are recorded through Videos and Audios and are accepted but in India we are yet to follow this procedure. Registration of Will is not compulsory. Registration of Will does not bring any extra advantage.

Signature of the Testator

The Will should contain maker's signature or his thumb impression. In case he is unable to sign or put his thumb impression, he can ask other persons to put signatures on the document in his presence. Generally, the signatures will be at the end of the document.

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* Source : Legal Awareness Series 1, Legal Aid Cell, Pendekanti Law College, Hyderabad.

Signatures of the Witnesses

Every Will must be attested by two witnesses but there is no rule that the two witnesses should attest the will at the same time. However, the Will should be written by the maker (Testator) in the presence of witnesses or he should convey the fact of writing the Will to the witnesses. These two witnesses should attest the Will in the presence of the Testator.

Any person other than a minor can be a witness but a beneficiary out of the Will cannot be a witness. The witnesses need not know all the particulars written in the Will. The only requirement is that the Testator should sign the Will in their presence or should accept the fact of writing the Will.

When the Will is Invalid?

Any Will written under coercion or fraud is invalid. For example, if any person gets a Will written by another person under the threat of killing him or defaming him, the Will is an invalid one.

The language of the Will

The Will should be written in a clear and unambiguous language. It need not contain any legal terminology but the Will should reflect the intention of the Testator and the Will should contain the following things clearly:

The Will should specify the beneficiaries clearly. It should also specify the kind of rights transferred to such beneficiary. It should also contain when such transfer takes place (for example: whether after marriage or after becoming a major). It should also clearly specify the properties that are to be distributed to the beneficiaries of the Will.

Revocation of Will

A Will can be revoked or cancelled by writing a new Will. A subsequent Will can also alter the earlier Will. While cancelling the earlier Will or Wills the new Will shall refer to the fact of cancelling the earlier ones. A Will can be revoked (cancelled) even by a Codicil (will discuss codicil later). While cancelling or revoking an earlier Will by writing a new Will, all the precautions that were taken (witnesses etc.,) at the time of writing the earlier Will shall be taken this time too . A Will can be cancelled by tearing or burning. The Will can be cancelled by these acts by other persons as well under his directions. A Will can be cancelled by writing two horizontal

lines on the Will in the presence of two witnesses. Signatures of those two witnesses have to be obtained.

Can a Will be altered without revocation?

A Will can be corrected without revoking it. But at every correction and the amendment there should be Testator's and witnesses' signatures. All the precautions that were taken for writing a Will, should be taken in this regard too.

Probating a Will?

The legal process of getting a Will certified in a Court of Law is called Probate, i.e., getting the Will certified as a proper Will. A private document declaring the ways and the persons to whom the Testator's property shall be distributed after his death is a Will. Hence, it is not necessary that it should be probated. Getting a Will probated is expensive and time consuming. If a person's movable and immovable properties are located in the cities like Hyderabad, Visakhapatnam and Madras or if the beneficiaries have to prove their rights, the Will has to be probated. If there are no objections regarding a Will there is no need to get it probated.

Executor

To execute the wishes contained in a Will, the Testator can appoint a person called an Executor. The executor has to collect all the dues to the Testator or maker and distribute them as per the instructions contained in the Will. Similarly, he makes the partition of the property as per the instructions of the Will. In case of necessity he gets the Will probated. Before appointing an executor it is necessary to take Testator's consent to know whether he is interested in executing the Will or not, so as to avoid probable future problems.

It is necessary for the Testator to appoint a person younger to him as an Executor. Because the Executor has to live longer than the Testator to implement or execute the Will. But a minor cannot be appointed as an Executor. Only majors and of sound minded can be appointed as Executors. There is no necessity to appoint an executor at the time of writing a Will. In the absence of any executor, any person among the legal heirs can undertake the responsibilities as executor. In the absence of such executor, a court can appoint an Administrator .to execute the Will.

There is no rule that only one executor has to be appointed. More than one executor can be appointed. In such cases, all the executors have to execute the Will. In case one of the executors die the other executors can undertake to carry on the duties and responsibility.

In whose favour the Will has to be written?

The Testator or maker can write a Will of his selfacquired property in favour of any person i.e., he can write a Will bequeathing (transferring) the property to any persons excluding his own heirs, like sons and daughters. But Muslims can write a Will bequeathing their property to strangers only to the extent of 1/3rd of the property. Muslim Law obligates the Testators to write a Will for the remaining 2/3rd property only to his legal heirs.

A Will is necessary even if the properties are in the joint names. In the absence of a Will, those properties go to his legal heirs under the Succession Act, but they do not go to the remaining joint holders.

MODEL WILL

1. Simple Will giving all the property to one person

I, AB etc., hereby revoke all former Wills and Codicils made by me and by this my last will bequeath and devide all my movable and immovable properties whatsoever and where-soever to my wife (or to, CD etc.,) absolutely and appoint her (him) sole executrix (executor) of this, my will.

IN WITNESS WHEREOF I have signed this Will hereunder on the _____ day of _____

Sd/-.

Signed by the above named testator in our presence at the same time and each of us has in the presence of the testator signed his name hereunder as an attesting witness.

1.

2.

2. Will bequeathing all the property to wife for life and thereafter to others, with annuities to several persons.

This is the last Will of me AB etc., made this the _____day of _____

1. I hereby revoke all former Wills and Codicils made by me.
2. I bequeath all my money and other movable property whatsoever and wheresoever to my wife XY absolutely.
3. I devide all my lands and other immovable properties to my wife XY for her life and after her death to my daughter CD absolutely and if the said CD shall die before my said wife then to my nephew GH.
4. I bequeath the following annuities to commence from the date of my death and to be paid in equal monthly payments :
   a. To my daughter CD etc., an annuity of Rs. _____ to be paid during her life;

b. To my sister EF an annuity of Rs. _____ during her life and after her death to be continued to her son, if any, or sons, if more than one, in equal shares;

c. To my nephew GH etc., an annuity of Rs. _____ during his life;

d. To my old servant JK etc., an annuity of Rs. _____ during his life;

IN WITNESS WHEREOF, I the said AB have signed this Will hereunder the day and year first above written. (Attestation as in form 1).